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IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

MILWAUKEE BREWERY WORKERS' PENSION PLAN,

Petitioner,

v.

JOS. SCHLITZ BREWING COMPANY and THE STROH BREWERY COMPANY,

Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

APPENDIX TO THE PETITION FOR WRIT OF CERTIORARI

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EXHIBIT A

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

Nos. 92-3811 & 92-3894

JOS. SCHLITZ BREWING COMPANY and
THE STROH BREWERY COMPANY,

Plaintiffs-Appellees, Cross-Appellants,

v.

MILWAUKEE BREWERY WORKERS' PENSION PLAN,

Defendant-Appellant, Cross-Appellee.

Appeals from the United States District Court
for the Eastern District of Wisconsin.
No. 88-C-908—**Robert W. Warren**, *Judge.*

ARGUED MAY 7, 1993—DECIDED AUGUST 13, 1993

Before BAUER, *Chief Judge*, and CUMMINGS and EASTERBROOK, *Circuit Judges.*

EASTERBROOK, *Circuit Judge.* Three brewers in Milwaukee—Schlitz, Miller, and Pabst—contributed to a multiemployer pension plan. The brewers also bargained jointly with the union over wages, pensions, and other benefits, and administered the pension plan. In 1981 Schlitz closed its Milwaukee brewery. (Schlitz has since been acquired by Stroh; we use its old name for clarity.) We must decide how much Schlitz owes as withdrawal liability under the Multiemployer Pension Plan Amendments Act of 1980 (MPPAA).

I

Several sets of documents govern relations between the Milwaukee Brewery Workers' Pension Plan and the Milwaukee Brewers' Association (the employers' collective bargaining group). An Association Agreement provides that the Labor Committee of the Brewers' Association may make decisions only by consensus: "All decisions and action taken by the . . . Labor Committee shall be by unanimous vote of the respective committee, with each brewery having a reasonable opportunity to cast its vote on the question." The Plan was managed and administered by a Joint Committee consisting of four members appointed by the union and four members appointed by the employers. This committee was bound by the agreement establishing the Plan. That agreement could be amended by the "mutual agreement of the Union and the Employers". So changes in the Plan required the assent of both labor and management, which had agreed to act by consensus. When the consensus ended the difficulties began.

Schlitz withdrew from joint bargaining in January 1981 because it thought the other employers too willing to accept the union's demands. When giving notice of this withdrawal, Schlitz stated that it would continue to sit on the Plan's Joint Committee and participate in the Plan. On June 1, 1981, the union struck Schlitz, which responded by closing its Milwaukee brewery. On August 14 the Schlitz representative on the Joint Committee resigned, and Schlitz withdrew from the Plan. At the time, the Plan was underfunded to the tune of $111 million. Inflation was high, leading the Plan to estimate big future obligations to pay benefits, while steep interest rates had depressed the capital value of the Plan's existing assets. Schlitz estimated that it would be responsible for $27 million of this shortfall under the "presumptive method" that the MPPAA specifies when a pension plan has not adopted another method of allocation. 29 U.S.C. §1391(b).

Withdrawal liability under the presumptive method depends on "the proportion of total employer contributions

to the plan made by the withdrawing employer during certain 5-year periods. In essence, the withdrawal liability imposes on the withdrawing employer a share of the unfunded vested liability proportional to the employer's share of contributions to the plan during the years of its participation." *Concrete Pipe & Products of California, Inc. v. Construction Laborers Pension Trust*, 113 S. Ct. 2264, 2273 (1993) (citations omitted). Under the "direct attribution" method, which the MPPAA permits most plans to elect, each employer is responsible for that portion of the unfunded, vested liabilities earned by its current and former employees. 29 U.S.C. §1391(c)(4). See *Artistic Carton Company v. Paper Industry Union-Management Pension Fund*, 971 F.2d 1346, 1349-50 (7th Cir. 1992). Miller and Pabst began to discuss adopting the direct attribution method, which altered the employers' shares of the $111 million. According to their memos, these were the options:

	Method of Attribution	
Brewer	Direct	Presumptive
Miller	$31,100,000 (28%)	$45,500,000 (41%)
Pabst	38,800,000 (35%)	38,800,000 (35%)
Schlitz	41,100,000 (37%)	26,700,000 (24%)

Miller, Pabst, and the union entered into memoranda of understanding in May 1981 purporting to amend the Plan to adopt the direct attribution method. Schlitz's assent was neither sought nor secured. On August 17, 1981, the remaining members of the Joint Committee directed the Plan's actuary to calculate Schlitz's withdrawal liability under the direct attribution method. Schlitz first learned of the change in funding method when it received notice in September 1981 that it owed $41,031,406. Schlitz demanded arbitration under 29 U.S.C. §1401(a)(1).

Arbitrator Siegel concluded that the Plan could be amended only by unanimous consent. 9 E.B.C. 2385 (1988). In May 1981, when Miller, Pabst, and the union tried to adopt the direct attribution method, Schlitz was still a

contributing employer and held a seat on the Joint Committee. Lack of unanimity left the presumptive method in effect. The parties' actuaries jointly concluded that under the presumptive approach (and using actuarial assumptions not at issue here) Schlitz owed only $23.3 million; the arbitrator incorporated that figure into his award. 9 E.B.C. 2689 (1988). The Plan petitioned for review in the district court, which agreed with the arbitrator's use of the presumptive method but added interest for the year in which Schlitz withdrew from the Plan, plus prejudgment interest on this interest. Both sides appeal. The district judge neglected to determine the amount of prejudgment interest, which usually is essential to finality (and thus appealability). *Osterneck v. Ernst & Whinney*, 489 U.S. 169 (1989). But the parties reached an agreement on the subject. The district court's order of October 20, 1992, apparently accepts this agreement, and Schlitz has paid in full. So although the district court has not entered the form of judgment required by Fed. R. Civ. P. 58, its decision of October 20 is nonetheless appealable under the approach of *Bankers Trust Co. v. Mallis*, 435 U.S. 381 (1978).

II

The extent of Schlitz's liability turns on whether it is bound by the purported modification of the Plan in 1981. Was the change by the "mutual agreement of the Union and the Employers", as the Plan's governing document provides? The Plan does not deny that Schlitz was a participating "employer" in May 1981. Schlitz argues that the ordinary understanding of "mutual", consistent with the Association Agreement's rules for decisionmaking, means that the Plan remains unchanged unless the employers agree unanimously to change it. Schlitz was not aware of, and did not agree to, the change in May 1981. The Plan tells us, however, that Schlitz's lack of assent is irrelevant. On its reading, "mutual agreement" does not mean that the Plan's participating employers must reach consensus. To the contrary, once Schlitz left the Brewers'

Association, it subjected itself to the risk that the remaining members—its competitors—would "mutually" agree with the union to amend the Plan in a way singularly disadvantageous to Schlitz. Arbitrator Siegel agreed with Schlitz, interpreting the phrase "mutual agreement" to mean "agreement by all"—that is to say, all "employers" contributing to the Plan, as opposed to the two employers still engaged in joint bargaining with the union.

Although the parties argue this appeal as if this court's role is to interpret the documents from scratch, neither side explains why. We are a court of review and not of first instance. A vital issue in many appeals, including this one, is the standard of review—that is, the relation between this tribunal and its predecessors. On most issues appellate review is deferential. When an arbitrator makes the initial decision, judges have only a modest role to play. *Paperworkers v. Misco, Inc.*, 484 U.S. 29 (1987); *W.R. Grace & Co. v. Rubber Workers*, 461 U.S. 757, 764 (1983). Cases under the Arbitration Act, 9 U.S.C. §§ 1-16, or arising out of collective bargaining agreements, usually present a simple question: did the arbitrator interpret the parties' agreement, or did he apply a rule he preferred to their agreement? If the former, the award is enforced; if the latter, not. *Hill v. Norfolk and Western Ry.*, 814 F.2d 1192, 1194-95 (7th Cir. 1987). Arbitrator Siegel unquestionably interpreted the Association Agreement and the Plan's governing documents; he tried to carry out the parties' rules rather than invent his own, and no one contends that the award is marred by fraud or corruption. See 9 U.S.C. §10. If this were a standard labor or commercial case, we could end here.

Aspects of this case resemble ordinary labor and commercial disputes. The Plan was created by labor and management, and a clause provides for arbitration in the event the Joint Committee is unable to resolve a dispute. Had today's case arisen before 1980, then, arbitration would have occurred and the judicial role would have been minimal. But when enacting the MPPAA in 1980 Congress

complicated matters substantially by simultaneously incorporating most provisions of the Arbitration Act, 29 U.S.C. §1401(b)(3), while adopting a unique standard of review. Section 1401(c) provides that in a judicial proceeding to review or enforce an award, "there shall be a presumption, rebuttable only by a clear preponderance of the evidence, that the findings of fact made by the arbitrator were correct." 29 U.S.C. §1401(c). Conflating "clear and convincing evidence" with "preponderance of the evidence" to yield "clear preponderance of the evidence" would be bad enough if it referred to the task of a trier of fact; as a standard of review it makes no sense. As the Supreme Court remarked when trying to digest some related provisions of the MPPAA, Congress apparently confused the standards applicable to trial and reviewing bodies, producing an "incoherent" statute. *Concrete Pipe*, 113 S. Ct. at 2281. Repair is essential, and like the Court in *Concrete Pipe* we reconstruct by supplying the normal rules: the arbitrator acts by a preponderance of the evidence, and a reviewing body inquires whether the facts so found are "clearly erroneous." See *Anderson v. Bessemer City*, 470 U.S. 564, 573 (1985). Perhaps the "clearly erroneous" standard of review, rather than the "clear and convincing evidence" burden of persuasion, was the source of "clear" in §1401(c). No matter the source, the standard is one of deference to the person who hears the evidence—although not as deferential as the "reasonable person" standard that applies to ordinary arbitration. *Concrete Pipe*, 113 S. Ct. at 2279-80.

Section 1401(c) addresses findings of fact. What of legal questions? Facts are unique to the parties; law is general. The Pension Benefit Guaranty Corporation has provided that "[i]n reaching his decision, the arbitrator shall follow applicable law, as embodied in statutes, regulations, court decisions, interpretations of the agencies charged with enforcement of the Act, and other pertinent authorities," 29 C.F.R. §2641.4(a)(1). This regulation, promulgated under the PBGC's authority to interpret the MPPAA, *Concrete Pipe*, 113 S. Ct. at 2279, implies non-deferential review.

For this and related reasons we held in *Trustees of Iron Workers Local 473 Pension Trust v. Allied Products Corp.*, 872 F.2d 208, 211-12 (7th Cir. 1989), that the arbitrator's legal conclusions are subject to *de novo* review. Yet the dominant theme remains deference, which accounts for our decision in *Chicago Truck Drivers Pension Fund v. Louis Zahn Drug Co.*, 890 F.2d 1405, 1409-11 (7th Cir. 1989), that the arbitrator's application of law to fact—in the argot, a decision on "mixed questions of law and fact"—may be set aside only for clear error.

Where does the interpretation of pension plans and other agreements fit into this scheme? The answer within the world of litigation would be: It depends. Both the declaration of trust establishing the Plan and the Association Agreement are contracts. When a contract is clear, a court declares its meaning as a matter of law. When a contract is ambiguous, a court sends questions of interpretation to the trier of fact. *RTC v. M&L Investments*, 984 F.2d 190, 193 (7th Cir. 1993); *Woodbridge Place Apartments v. Washington Square Capital, Inc.*, 965 F.2d 1429, 1439 (7th Cir. 1992). And the existence of ambiguity can present formidable problems. Pension agreements do not get to be ambiguous because of parol evidence, such as the fact that an employer joined with its fingers crossed behind its back, *Central States ... n Fund v. Gerber Truck Service, Inc.*, 870 F.2d 1... Cir. 1989) (in banc), or because of statements people ... to each other about the meaning of otherwise-clear documents, see *Bidlack v. Wheelabrator Corp.*, 993 F.2d 603, 608, 616 (7th Cir. 1993) (in banc). Still, ambiguous language (intrinsic ambiguity) or an unexpected application of language that appears clear in its linguistic context (extrinsic ambiguity) may pose problems for a trier of fact. *FDIC v. W.R. Grace & Co.*, 877 F.2d 614, 620-21 (7th Cir. 1989).

Courts ask whether the contract is "clear" in order to determine who makes the initial decision: judge or jury. Under the MPPAA, however, the arbitrator does the interpretation whether the text is clear or cloudy. Making the sorts of questions courts use to select between judge

and jury the key to review of the arbitrator's decision would add a layer of complexity to what should be a simple and expeditious system. Arbitration under the MPPAA is supposed to accelerate decision, but it has potential to delay matters by increasing from two to three the number of layers through which each dispute must pass; a debate in the district and appellate courts about whether the contract was clear (implying de novo review) or ambiguous (implying deferential review) would add to the potential for delay. Arbitrators serve a vital function in addition to speedy action: arbitrators may be chosen from persons knowledgeable about the industry and the kind of pension plan at issue, promoting accurate resolution of disputes. *I.A.M. National Pension Fund Benefit Plan C v. Stockton Tri Industries*, 727 F.2d 1204, 1208 (D.C. Cir. 1984). What appears "clear" to a judge alien to the industry may be ambiguous to an expert versed in its nuances; what appears cloudy to a judge may speak plainly to an arbitrator who understands the problems and solutions of the trade. Thus an effort to tailor the standard of review to the *judge's* estimate of clarity could misfire. What is more, every time a court substitutes its judgment for that of the arbitrator, the benefit of proficiency is lost and disposition becomes more sluggish.

Because the parallel to labor and commercial arbitration is imperfect given the MPPAA's unique review provision—and because arbitration under the MPPAA sometimes is involuntary, and the standard of review must govern these cases as well as those in which the pension plan has its own arbitration clause—we adopt a standard that is slightly more demanding than the norm in labor law. Instead of asking only whether the arbitrator interpreted the contract (as opposed to making up his own rule), we ask whether the arbitrator adopted a reasoned interpretation of the documents. To avoid proliferation of standards (one novelty, in §1401(c), is quite sufficient) we draw an analogy to the relation between agency and court under the Administrative Procedure Act. An agency must give thoughtful consideration to the opposing arguments,

but a reviewing court does not ask whether the agency was "right." Instead it asks whether the decision was arbitrary or capricious, or otherwise not in accordance with law. That familiar standard should serve well under the MPPAA, a complex field in which the arbitrator serves in part as a surrogate for the PBGC. (The provisions of the MPPAA were designed in large measure to avoid a sequence of withdrawals that would shift liability to the guaranty fund maintained and administered by the PBGC.)

Is deferential review of the arbitrator's interpretation inconsistent with 29 U.S.C. §1401(a)(3)(A), which provides that "any determination made by a plan sponsor under [§§ 1381-99, 1405] is presumed correct unless the party contesting the determination shows by a preponderance of the evidence that the determination was unreasonable or clearly erroneous"? Not at all. Section 1401(a)(3)(A) establishes a presumption that the arbitrator must consider. It does not affect the allocation of interpretive authority between the arbitrator and a reviewing court. Just what §1401(a)(3)(A) *does* do was one of the subjects the Supreme Court considered in *Concrete Pipe*, where it understood this language to mean that in the proceeding before the arbitrator the employer must "disprove a [plan sponsor's] challenged *factual* determination by a preponderance" of the evidence. 113 S. Ct. at 2283 (emphasis added). There are no factual disputes in our case, and the Plan did not make any factual determinations to which the arbitrator owed deference.

Arbitrator Siegel's interpretation of "mutual agreement" to mean "by unanimous agreement of all parties concerned"—that "the Union and all the Employers agree to any amendment of the Plan", 9 E.B.C. at 2394—is neither arbitrary nor capricious. The "mutual agreement" language applies to all changes in the pension plan. A conclusion that Miller and Pabst could change the rules for computing withdrawal liability without Schlitz's assent would imply an equal power to increase the pensions and other benefits promised to labor, to increase the required

rate of contributions, and to make any other alteration. No sane firm gives its business rivals such power, and the arbitrator did not act whimsically in concluding that Schlitz had not done so. "Mutual agreement" reads naturally just as the arbitrator understood it, and the parties' own practice under this language was one of negotiating unanimous agreement before making any alterations in the Plan.

According to the Plan, ¶12.08(b)(13) of the Plan Document, which gives the Joint Committee power to interpret ambiguous language, means that the arbitrator could not disagree with the Joint Committee's assessment of withdrawal liability. *Concrete Pipe* scotches that contention by observing that a person ordered to pay a large sum of withdrawal liability is entitled to an independent review by a neutral decisionmaker. 113 S. Ct. at 2283. Withdrawal liability depends on the MPPAA, not on the parties' agreement, and the statute does not permit one person to make an unreviewable assessment against another. What is more, it distorts the events of 1981 to say that the Joint Committee "interpreted" any part of the Plan Document. Schlitz disputes the *validity* of an amendment to the Plan, not the *interpretation* of that amendment if the direct attribution method was properly adopted. Remember how the Joint Committee got involved: months after Miller, Pabst, and the union purported to amend the Plan, the Joint Committee instructed the Plan's actuary to calculate Schlitz's liability pursuant to the direct attribution method. The Plan has not provided us with any reason to believe that, in doing so, the Joint Committee itself interpreted "mutual agreement."

We can imagine one last argument. Might it be possible that, putting the machinations of May 1981 to one side, the remaining employers and the union properly amended the Plan in September 1981—after Schlitz's representative had withdrawn from both the Association and the Plan? Perhaps, but Schlitz would not be the worse for it. The MPPAA provides that amendments adopted after January 31, 1981, changing the method of calculating withdrawal

liability do not apply to an employer that withdrew before the amendment. 29 U.S.C. §1394(a). The rationale for this rule is the same as the rationale for unanimity in the Association Agreement: otherwise businesses can gang up to squeeze their competitor. Thus we accept the arbitrator's decision that the acts of Miller, Pabst, and the union in May and September 1991 did not adopt the direct attribution method—at least, did not adopt that method in a way that permits the Plan to apply it to Schlitz.

III

The Plan has a fallback position, with several steps. (1) When selecting a method of withdrawal liability, all three employers acted as fiduciaries to the Plan. (2) A fiduciary acting in May 1981 would have been required to prefer the direct attribution method to the presumptive method. (3) Had Schlitz attended the meetings in May 1981 it would have voted for the direct attribution method even though that disserved its own interests (and had Schlitz violated its fiduciary responsibility, a court would have intervened). (4) Because the direct attribution method *would* have been adopted by unanimous consent had Schlitz fulfilled its responsibilities, the arbitrator should have treated the Plan *as if* it had been amended.

There is a certain logic to this, but also an air of unreality. Pabst and Miller did not even invite Schlitz to the meetings. Having deprived it of an opportunity to act, they are scarcely in a position to dictate the outcome. Consider a parallel in corporate law. Members of the board of directors are fiduciaries. Corporations also have rules for determining the validity of the board's acts—quorum requirements and sometimes supermajority rules. Could a single member of the board change the corporation's bylaws, without calling a meeting (and necessarily without satisfying quorum and other requirements), by declaring that all fiduciaries *must* support his proposal, making a meeting superfluous? Most doubtful, yet this is what the Plan's position entails. At all events, the Plan's posi-

tion fails at the first step. Employers do not act as fiduciaries when establishing the terms of a pension plan.

According to the Employee Retirement Income Security Act (ERISA), to which the MPPAA belongs, a person is a fiduciary of a pension plan if:

> he exercises any discretionary authority or discretionary control respecting management of such plan or exercises any authority or control respecting management or disposition of its assets . . . .

29 U.S.C. §1002(21)(A)(i). The fiduciary "shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries". 29 U.S.C. §1104(a)(1). Managing a plan is some distance from establishing the *terms* of a plan. See *Young v. Standard Oil (Indiana)*, 849 F.2d 1039, 1044-45 (7th Cir. 1988); *United Independent Flight Officers, Inc. v. United Air Lines, Inc.*, 756 F.2d 1262, 1268-69 (7th Cir. 1985); *Amato v. Western Union International Inc.*, 773 F.2d 1402, 1416-17 (2d Cir. 1985); *Hozier v. Midwest Fasteners, Inc.*, 908 F.2d 1155, 1161 (3d Cir. 1990); *Musto v. American General Corp.*, 861 F.2d 897, 911-13 (6th Cir. 1988); *Cunha v. Ward Foods, Inc.*, 804 F.2d 1418, 1432-33 (9th Cir. 1986). These and other cases hold that firms may set the terms of a pension plan, such as the level of benefits achieved after a given length of service, as employers rather than fiduciaries, a position that not only makes sense of the "management" language in ERISA but also recognizes that pension benefits are deferred compensation. Employers no more have a fiduciary obligation to assure larger pensions for their workers than they do to pay higher wages.

The Plan concedes that in establishing the level of benefits and the employers' contributions the brewers do not act as fiduciaries. Nonetheless it contends that amendments "which impact vested benefits in a defined benefit plan *are* fiduciary functions," (emphasis added), and that the choice of a method of determining withdrawal liability is one such amendment:

> [A]llocation may bear upon the collectability of the funds. Delay and additional administrative costs associated with pursuing a financially weakened or bankrupt employer . . . may reduce the fund's ability to make the vested, earned benefit payments. . . .
>
> Allocation impacts future wages and benefits to plan participants as the remaining employers struggle to cover inherited unfunded liability or are relieved from that burden. The method selected may trigger an employer to withdraw from a plan in order to take advantage of a method which it believes is favorable. Implementing one method may result in significant administrative costs to a plan which are not associated with other methods.

Of course one could say the same thing about levels of funding. If employers have a fiduciary obligation to use the method of computing withdrawal liability that maximizes the pension plan's current wealth, do they not have an even clearer obligation to increase their contributions so that the plan is not underfunded in the first place? Is not "underfunding" the most obvious breach of duty? Yet at oral argument the Plan (speaking for Miller and Pabst, no doubt) stoutly denied that employers have any fiduciary obligation to increase their payments to a plan in order to bring it to full funding. If selecting a level of funding is not a fiduciary obligation, how can selecting a method of computing withdrawal liability be?

Withdrawal liability is to be calculated pursuant to the presumptive formula in 29 U.S.C. §1391(b), but parties may select the direct attribution method, one of two other methods, or make up their own method with approval by the PBGC. 29 U.S.C. §1391(c)(5). Construction industry plans must use the presumptive method, §1391(c)(1), but others may select freely; the statute does not establish criteria under which a plan must adopt one method or another. The absence of criteria leaves the choice in private hands—which is to say that like levels of benefits it is a subject for contract rather than legal obligation.

A plan established jointly by labor and management is governed by the statutory obligation of good faith bargaining. 29 U.S.C. §158(d). But ERISA also governs pension and welfare plans established unilaterally, and employers are free to alter or disestablish these plans at will. *Electronic Workers v. Murata Erie North America, Inc.*, 980 F.2d 889 (3d Cir. 1992); *McGann v. H&H Music Co.*, 946 F.2d 401 (5th Cir. 1991).

For what it is worth, we add that the second step of the Plan's argument is no more sound than the first. Each method produces a total of $111 million in withdrawal liability; only the allocation among employers is at issue. The Plan's expert testified before the arbitrator that the direct attribution method was in the Plan's best interest in 1981 because it accelerated the rate at which the Plan could become fully funded. Fundamentally, the expert testified that a bird in the hand is worth two in the bush. Miller, Pabst, and union representatives could have concluded, as this witness did, that direct attribution served the Plan's interests. We say "could have" because nothing in the record reflects that those who met in May 1981 acted as fiduciaries or, indeed, gave the slightest weight to the interests of employees with vested benefits. None of the contemporaneous documents so much as mentions the best interests of the Plan. Although the Plan talks on appeal about the necessity of matching the amount of withdrawal liability with each employer's financial strength, no such concerns surfaced during the discussions. Instead, each employer acted in its self-interest—Schlitz by bargaining independently, and Miller and Pabst by voting to shift more of the burden of the Plan's unfunded liability onto Schlitz. The papers document a series of attempts by each brewery to minimize its financial exposure while maximizing the obligations of its competitors. Maybe transferring a greater share to Schlitz increased the probability of collection, but Schlitz insists that in May 1981 Miller was best able to pay, and Miller's withdrawal liability went down. Nothing in the record demonstrates that firms with only the employees' interests at heart would have selected the direct attribution method.

Parties to a multi-employer pension plan may agree that decisions regarding allocation of withdrawal liability must be made in the plan's best interests, or subject to some other heightened standard. The parties to this Plan, however, reserved the subject to the collective bargaining process, in which each looked out for its own interests. Federal law does not prohibit that decision.

IV

The Plan's actuary includes, as part of Schlitz's withdrawal liability, interest for all of 1981. Arbitrator Siegel disallowed this interest as inconsistent with the MPPAA. The district judge disagreed and ordered Schlitz to pay the interest, plus prejudgment interest on that interest. The parties agree that the propriety of assessing this interest is a question of law, on which our review is plenary, rather than a question on which the arbitrator and courts must defer to the actuary under 29 U.S.C. §1401(a)(3)(B). See also *Concrete Pipe*, 113 S. Ct. at 2284-86.

Schlitz tells us that the district court's reading of the MPPAA conflicts with that of the PBGC, which has interpreted the statute to prohibit the assessment of such interest. If the PBGC had issued a regulation or other formal interpretation on the question, we would respect its judgment to the extent *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), requires. The PBGC has been delegated powers to enforce the MPPAA, see 29 U.S.C. §1303(e)(1), which usually leads courts to accept its understanding of that complex (and all too frequently ambiguous) law. E.g., *Mead Corp. v. Tilley*, 490 U.S. 714, 726 (1989); *Allied Products Corp.*, 872 F.2d at 210 n.2; *Robbins v. McNicholas Transportation Co.*, 819 F.2d 682, 686 (7th Cir. 1987). Yet the PBGC has not issued any regulation or opinion on this subject. The interpretation to which Schlitz points appears in a brief filed as amicus curiae in *Huber v. Casablanca Industries, Inc.*, 916 F.2d 85 (3d Cir. 1990). Courts do not defer to "agency litigating positions that are wholly un-

supported by regulations, rulings, or administrative practice." *Bowen v. Georgetown University Hospital*, 488 U.S. 204, 212 (1988). Only the agency, and not its lawyers, exercises delegated power. *SEC v. Chenery Corp.*, 318 U.S. 80, 88 (1943). Did that brief articulate the policy of the agency, or was it a concoction of appellate counsel? The PBGC did not participate in this case. Even were we sure that the position taken in *Huber* was the PBGC's rather than its lawyer's, see *Georgetown University Hospital*, 488 U.S. at 212; *Atlanta College of Medical and Dental Careers, Inc. v. Riley*, 987 F.2d 821, 828 n.10 (D.C. Cir. 1993); cf. *Martin v. Occupational Safety and Health Review Commission*, 111 S. Ct. 1171, 1179 (1991), we could not be sure that it subscribes to this view today. See *Mead Corp.*, 490 U.S. at 726 n.11. We must decipher the MPPAA for ourselves.

Multi-employer plans calculate their funding status only once per year, on December 31. If they are underfunded on that date, an employer withdrawing during the next year owes withdrawal liability in an amount determined by the December 31 calculation. 29 U.S.C. §1391(c)(2)(C)(i). An employer withdrawing in mid-year is entitled to amortize its liability over a period set by the Plan. Section 1399(c)(1)(A)(i) provides the rule under which the lump sum is converted to installments: "[A]n employer shall pay the amount determined under [§1391] . . . over the period of years necessary to amortize the amount in level annual payments . . . , calculated *as if the first payment were made on the first day of the plan year following the plan year in which the withdrawal occurs*" (emphasis added). In our case the Plan year apparently coincides with the calendar year. A withdrawing employer's schedule thus assumes a delay in payment—although the employer may pay sooner, and in our case it did so. Schlitz, which withdrew in August 1981, made its first payment on October 29, 1981. An assessment of interest between the date of withdrawal and the date on which payments begin, in order to make the amortization schedule actuarially correct, would not be troubling. *Huber*, 916 F.2d at 98-100.

It may help to think of the employer as "borrowing" the amount of withdrawal liability from the plan on the date of withdrawal, and owing this sum plus interest under the schedule set per §1399(c)(1)(A)(i). But the Plan's actuary did not start the interest in August 1981, or on the date the Plan presented its demand, or on the date the first payment came due. Instead the actuary computed interest from December 31, 1980, while Schlitz was still a contributing employer. The theory is that if the end of the last calendar year is used to compute the Plan's funding shortfall, it should be used for all purposes, including interest. Other courts refer to this as "pre-demand" or "gap year" interest.

By instructing plans to use the amount of unfunded vested benefits at year-end, Congress has spared actuaries the need to revalue plan assets and liabilities every time an employer withdraws during the year. Cf. 29 U.S.C. §1082(c)(9) (requiring every plan to calculate the plan's liability yearly). Sometimes the underfunding will rise between December 31 and withdrawal; sometimes it will fall; the law of large numbers evens these things out for plans (although not for particular employers). Establishing a simple rule for calculating funding shortfalls has nothing to do with interest, and the MPPAA does not imply that withdrawing employers *owe* anything as of the end of the year before they drop out. Schlitz owed $23.3 million to the Plan as of August 1981, not as of December 1980. Schlitz was not liable for a penny until it withdrew from the Plan and received a notice of liability. The MPPAA specifically authorizes assessing the withdrawing employer with interest under several circumstances, 29 U.S.C. §1399(c)(3), (c)(4), (c)(5), but says nothing about interest prior to withdrawal. Neither the word "amortize" (on which the district court's decision turned) nor any other language of the statute supports an approach that calls for pre-withdrawal interest. We join the fourth circuit in concluding that the MPPAA does not authorize the assessment of interest before an employer's obligation to pay arises. *Borden, Inc. v. Bakery Union Pension*, 974 F.2d 528, 536

(4th Cir. 1992). To the extent *Huber* suggests that there are circumstances under which an employer must pay interest for the gap between the December 31 calculation date and the date of actual withdrawal, we disapprove that decision. (Whether *Huber* actually holds such a thing is doubtful.)

The Plan has not argued that it is entitled to interest for the period between withdrawal in August 1981 and the commencement of the amortization schedule in January 1982. Hence there is no basis on which to question the arbitrator's decision. The district court's judgment is affirmed to the extent it holds that Schlitz's withdrawal liability must be determined according to the presumptive method and reversed to the extent it requires Schlitz to pay interest for 1981. The case is remanded with instructions to enforce the arbitrator's award in its entirety.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

EXHIBIT B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

JOS. SCHLITZ BREWING COMPANY and
THE STROH BREWERY COMPANY,

Plaintiffs, JUDGMENT IN A CIVIL CASE

v.

MILWAUKEE BREWERY WORKERS
PENSION PLAN,

Defendant. CASE NUMBER:88-C-908

☐ Jury Verdict. This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

☒ Decision by Court. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that (1) the Court affirms the arbitrator's decision to deny the Plan's motion to dismiss; (2) the Court affirms the arbitrator's finding that the Plan required unanimous consent of all employers in order to adopt the direct attribution method of calculating Schlitz's withdrawal liability; (3) the Court affirms the arbitrator's finding that ERISA law does not impose a fiduciary duty upon a Plan's members when they decide whether to change the method of calculating withdrawal liability and (4) the Court vacates the arbitrator's decision that the Plan improperly included interest for the

period between December 31, 1980 and January 1, 1982 in calculating Schlitz's payment schedule.

June 6, 1991
Date

SOFRON B. NEDILSKY
Clerk

(By Deputy Clerk)

EXHIBIT C

Copy mailed to attorneys for parties by the Court pursuant to Rule 77(d) Federal Rules of Civil Procedures.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

JOS. SCHLITZ BREWING CO. and
THE STROH BREWERY COMPANY,

Plaintiffs,

v. Case No.: 88-C-908

MILWAUKEE BREWERY WORKERS'
PENSION PLAN,

Defendant.

ORDER

On June 6, 1991, this Court issued a *Decision and Order* affirming in part and vacating in part an arbitrator's decision with respect to the parties' case. This Court, among other things, vacated the arbitrator's decision that the Plan improperly included interest pursuant to 29 U.S.C. § 1399(c)(1) for the period between December 31, 1980 and January 1, 1982 in calculating Schlitz's payment schedule.

Now before the Court is the Plan's Motion to Amend Judgment. In this motion, the Plan requests this Court: (1) either to include a money judgment against Schlitz for interest for the year 1981 or to specify a mechanism to be followed to determine such amount and (2) to award pre-judgment interest on that amount at an appropriate rate.

I. AMENDMENT OF JUDGMENT TO INCLUDE A MONEY AWARD FOR INTEREST FOR THE YEAR 1981

The judgment entered in this matter on June 6, 1991 pursuant to this Court's *Decision and Order* does not specify the amount of interest for the period between December 31, 1980 and January 1, 1982. Accordingly, the Plan requests this Court to order the amendment of the judgment either to include a money judgment against Schlitz for interest for the year 1981 or to specify a mechanism to be followed to determine such amount. While reserving its right to appeal this Court's partial vacating of the arbitrator's decision, Schlitz states that it has no objection to an amendment of the judgment to include a specific amount for interest for the year 1981. Schlitz notes, however, that the Plan's motion does not identify the amount sought or an appropriate payment schedule. Schlitz states that it is prepared to work with the Plan to arrive at an appropriate figure consistent with this Court's *Decision and Order*. Accordingly, Schlitz requests that the Court establish a schedule which provides the parties and their actuaries with an opportunity to resolve the 1981 interest issue. Schlitz states that if the parties fail to resolve the issue within the prescribed period, they should be directed to submit the issue to the Court for final resolution. The Plan concurs that it would be appropriate for this Court to establish a schedule for the parties and their actuaries to attempt to resolve this issue and that if they are unable to reach an agreement that the matter should be submitted to the Court for final resolution.

At oral argument, the Plan's counsel requested that this Court set a short schedule of seven to ten days for the parties' actuaries to attempt to resolve this matter. In response, Schlitz' counsel stated that a period of thirty days is necessary. This Court is not expert in the area of actuarial accounting. However, it believes that a period of twenty days should be sufficient for the parties' actuaries

to meet and should address the Plan's desire for a quick resolution of this matter.

II. PREJUDGMENT INTEREST

The Plan seeks prejudgment interest from July 7, 1988, the date of the arbitrator's decision, on Schlitz' obligation to pay interest for the year 1981. In addressing the Plan's request, this Court must determine: (1) if an award of prejudgment interest is appropriate and (2) if so, what the rate of prejudgment interest should be.

A. Whether Prejudgment Interest is Appropriate

The Plan argues that an award of prejudgment interest is appropriate under Seventh Circuit case law. The Plan cites *Rivera v. Benefit Trust Life Ins. Co.*, 921 F.2d 629 (7th Cir. 1991). The *Rivera* court stated:

> The award of prejudgment interest for a federal law violation is governed by federal common law. The Supreme Court has held that "[p]rejudgment interest is an element of complete compensation." *West Virginia v. United States*, 479 U.S. 305, 310-11, 107 S.Ct. 702, 706-07, 93 L.Ed.2d 639 (1987); *see also General Motors Corp. v. Devex Corp.*, 461 U.S. 648, 655-56, 103 S.Ct. 2058, 2062-63, 76 L.Ed.2d 211 (1983). The growing recognition of the time value of money has led this court to rule that "prejudgment interest should be presumptively available to victims of federal law violations. Without it, compensation of the plaintiff is incomplete and the defendant has an incentive to delay."

Id. at 696 (7th Cir. citations omitted). The Plan argues that an award of prejudgment interest is particularly appropriate in this case because: (1) the Plan has lost the use of the 1981 interest since July 7, 1988 because of the arbitrator's award; (2) Schlitz has been unjustly enriched

with the use of the 1981 interest since July 7, 1988 because of the arbitrator's decision; and (3) the 1981 interest is a fixed and determinable sum.

In response, Schlitz states that an award of prejudgment interest is inappropriate for two reasons: (1) because Schlitz has violated no federal law which would support an award of prejudgment interest and (2) because Congress has indicated its intent not to provide for an award of prejudgment interest in this situation.

(1) No Violation of Federal Law by Schlitz

Schlitz argues that an award of prejudgment interest under federal common law is inappropriate because it violated no federal law. *See Rivera* at 696. Schlitz notes that the *Rivera* court stated that " 'prejudgment interest should be presumptively available to *victims of federal law violations'* " *See id.* (emphasis added). Schlitz asserts, and the Plan concurs, that it timely made all withdrawal liability payments as required by the initial determination of the Plan and the final decision of the arbitrator. *See* 29 U.S.C. § 1401(d) (§ 4221(d) of ERISA). Accordingly, Schlitz argues that it has been in compliance with federal law and that, therefore, the Plan is not a victim of a federal law violation.

However, as this Court held in its June 6, 1991 *Decision and Order*, the arbitrator's decision with respect to 29 U.S.C. § 1399-(c)(1) was improper. Thus, although Schlitz complied with the requirements of § 1401(d), federal law, specifically § 1399(c)(1), was violated. Moreover, in order to ensure that the Plan is compensated to the degree it would have been if the arbitrator correctly decided the 1981 interest issue, this Court must award prejudgment interest from July 7, 1988 onward. This awarding of interest is consistent with the Supreme Court's statements in *Devex Corp.*, a case cited by the *Rivera* court. *See Devex Corp.* at 655-56, n.10 ("The traditional view, which treated

prejudgment interest as a penalty awarded on the basis of the defendant's conduct, has long been criticized on the ground that prejudgment interest represents 'delay damages' and should be awarded as a component of full compensation").

(2) Congress' Intent

Schlitz next argues that Congress has determined the prejudgment interest issue in this case by specifically providing for an award of such interest in certain circumstances and not in this case. In particular, Schlitz notes that at 29 U.S.C. § 1132(g)(2) (§ 502(g) of ERISA), Congress provided for the award of prejudgment interest where an employer is delinquent in making contributions to a plan. Schlitz notes that it was not delinquent since it initially complied with the determination of the Plan and later followed the arbitrator's decision.

However, as is shown in, courts have employed federal common law to award prejudgment interest even where the ERISA statute does not specifically call for it. Accordingly, the fact that Congress specifically provided for an award of prejudgment interest where an employer is delinquent under § 1401(d) does not mean that an award is inappropriate where an employer, although in compliance with § 1401(d), fails to make payments properly due under 29 U.S.C. § 1399(c)(1).

Moreover, this Court notes that the language of § 1132(g)(2) does not indicate an intention by Congress to prevent the awarding of prejudgment interest where an employer is not delinquent in his contributions. Rather, § 1132(g)(2) indicates Congress' intent to compel courts to award penalty damages where an employer is delinquent. The section requires that a "court *shall* award the plan" (1) the unpaid contributions; (2) prejudgment interest; (3) an amount equal to the greater of (a) prejudgment interest or (b) liquidated damages provided under the plan; (4) reason-

able attorney's fees and costs and (5) such other legal and equitable relief as the court deems appropriate. *See*, 29 U.S.C. § 1132(g)(2) (emphasis added). Thus, § 1132(g)(2) shows Congress' strong desire to have the courts employ prejudgment interest along with other remedies to punish and deter delinquent employers as well as to compensate plans. Here, the Court, pursuant to its discretionary authority under the federal common law, awards prejudgment interest not to punish Schlitz but merely to compensate the Plan for the lost use of money owing to it and to insure that Schlitz is not unjustly enriched. As stated above, the Supreme Court has approved the awarding of prejudgment interest for these purposes.

B. Proper Rate of Prejudgment Interest

Federal law does not provide a statutory rate for prejudgment interest. The Seventh Circuit has suggested that "district court judges use the prime rate for fixing prejudgment interest where there is no statutory interest rate." *See Gorenstein Enterprises v. Quality Care-USA*, 874 F.2d 431, 436 (7th Cir. 1989). The *Gorenstein* court noted that the prime rate "is a readily ascertainable figure which provides a reasonable although rough estimate of the interest rate necessary to compensate plaintiffs not only for the loss of the use of their money but also for the risk of default." *See id.*

At oral argument, the Plan's counsel suggested that this Court award prejudgment interest at the rate of interest the Plan received on its investments during the relevant time period. The rate the Plan received on its investments depended upon the level of risk the Plan was willing to incur. Because this Court lacks knowledge as to the level of risk of the Plan's investments and because this risk is unrelated to the risk of Schlitz' default, the Court declines to award prejudgment interest at this rate.

In plaintiff's principal brief, it also suggests that this Court award interest at the rate set forth in 28 U.S.C. § 1961(a). Section 1961(a) fixes the postjudgment interest rate for federal cases as the rate on 52-week Treasury bills at the last auction of those bills before the judgment was entered. The rate of interest provided for in § 1961(a) is lower than the prime rate and has been rejected by the Seventh Circuit. "This rate is too low, because there is no default risk with Treasury bills." *See id.* at 437. Accordingly, this Court declines to award prejudgment interest at this rate as well.

III. SUMMARY

Under the foregoing reasoning, this Court **GRANTS IN PART** the Plan's motion to amend judgment. This Court **ORDERS** the parties to attempt to arrive at an appropriate figure for the 1981 interest amount consistent with this Court's June 6, 1981 *Decision and Order*. The parties should inform this Court in writing whether they were able to reach a resolution of the issue within twenty (20) days of the signing of this Order. If the parties have not reached agreement at this time, this Court will set a hearing date in the near future to address the issue.

This Court also **FINDS** that the Plan is entitled to prejudgment interest at the prime rate from July 7, 1988 on the 1981 interest amount.

Dated this 3rd day of June, 1992, at Milwaukee, Wisconsin.

ROBERT W. WARREN
SENIOR UNITED STATES
DISTRICT JUDGE

EXHIBIT D

Copy mailed to attorneys for parties by the Court pursuant to Rule 77(d) Federal Rules of Civil Procedures.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

JOS. SCHLITZ BREWING CO. and
THE STROH BREWERY COMPANY,

Plaintiffs,

v. Case No.: 88-C-908

MILWAUKEE BREWERY WORKERS'
PENSION PLAN,

Defendant.

ORDER

Before the Court are the parties' motions disputing the amount of prejudgment interest which should be imposed and the date on which post-judgment interest should begin to accrue. The plaintiff, Joseph Schlitz Brewing Company ("Schlitz"), withdrew from its multiemployer pension plan, the Milwaukee Brewery Workers' Pension Plan ("the Plan"), in September 1981. Pursuant to the Plan's regulations, Schlitz began paying the Plan a quarterly withdrawal liability assessment based upon a projected liability of $41,031,406. Under this schedule, quarterly payments of $986,370 would be made until the full amount was paid by

the year 2001.[1] Although Schlitz made regular payments, it contested the Plan's assessment of liability and proceeded to arbitrate this issue.

On July 7, 1988, an arbitrator determined that Schlitz was liable to the Plan in the amount of $23,300,000. At this juncture, the parties agreed to modify the payment schedule. Schlitz was required to pay $986,370 on August 1, 1988 and $880,331 on November 1, 1988, at which time its obligation would have been fulfilled. Schlitz made these payments, but no further payments. In the meantime, both the Plan and Schlitz brought motions before the Court. The Plan moved the Court to vacate and modify the arbitration award, and Schlitz requested confirmation of the arbitration award.

In an *Order* dated June 6, 1991, this Court upheld the arbitrator's decision on liability, but concluded that the dollar amount was incorrect and should have been $24,931,000. The difference of $1,631,000 accounted for interest on Schlitz's liability between December 31, 1980 and January 1, 1982, which the arbitrator had not applied previously. One year later, after the parties had briefed the issues, the Court concluded that the Plan was entitled to prejudgment interest at the prime rate from July 7, 1988.

Once the Court found that the arbitrator's decision did not take into account the 1981 interest, this payment schedule was modified by the parties. Actuaries for both parties agreed that under the modified payment schedule, Schlitz owed the Plan $106,039 as of November 1, 1988;[2]

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[1] These payments, in accordance with ERISA regulations, were to be amortized over a period of time. The Court found that the use of the word "amortization" implied that interest on the liability would be included in the payments.

[2] This amount reflects Schlitz's payment of $880,331 on this date. Because the payment should have been $986,370 under the

(continued...)

$986,370 as of February 1, 1989; $986,370 as of May 1, 1989; and $540,262 as of August 1, 1989. However, the calculation of prejudgment interest on these amounts is at issue.

Schlitz believes that the interest on these amounts should accumulate from the date that each payment became due, whereas the Plan argues that interest should accumulate on the sum of these payments from July 7, 1988. The difference between the two proposals amounts to $249,196 as of June 1, 1991. In addition, there is a dispute as to whether the judgment entered pursuant to the Court's *Order* by the Clerk of Court on June 6, 1991 is a final judgment. If so, the Plan would not be entitled to prejudgment interest after that date, and post-judgment interest would be calculated instead.

PREJUDGMENT INTEREST

In this case, the Court awarded prejudgment interest in order to "compensate the Plan for the lost use of money owing to it and to insure that Schlitz is not unjustly enriched." *Order*, June 3, 1992 at 6. To determine the amount due to the Plan, it is necessary to predict what would have occurred had the arbitrator imposed liability in an amount which included the interest from 1981. If the arbitrator had concluded that Schlitz's liability totalled $24,931,000 instead of $23,300,000, Schlitz ostensibly would have continued with its monthly payments in the amount of $986,370 until its obligations were met. This would have obviated the need for prejudgment interest, since the payment schedule, which is meant to "amortize the amount in level payments," would have taken the accrual of interest into account. 29 U.S.C. § 1399(c)(1).

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[2] (...continued)
original schedule, Schlitz owes the difference between the two, or $106,039.

The parties' actuaries have agreed that the payments, had they continued without interruption while the matter was pending before the Court, would have been as follows:

11/1/88	$986,039[3]
2/1/89	$986,370
5/1/89	$986,370
8/1/89	$540,262

Because this payment schedule was not followed, the Plan had to forego its regular payments to which it should have been entitled. However, this does not mean that the Plan should receive interest on $2,619,041 from July 7, 1988. That would not have been the result under the Plan's guidelines or under 29 U.S.C. § 1399 (c) (1). Rather, the Plan would have continued to receive quarterly payments in the amount of $986,370. These payments would have taken into account the interest that was accruing due to Schlitz's paying in installments rather than a lump sum.

Adopting the Plan's repayment schedule would result in the Plan receiving prejudgment interest on payments that technically had not become due yet. The Court finds Schlitz's calculations to be accurate and fair. By imposing prejudgment interest as of the date that the payments should have been due, the Court will be placing the Plan in the same position as it would have been had the arbitrator included the 1981 interest in his award. Therefore, the Court shall impose prejudgment interest on Schlitz's withdrawal liability as Schlitz's actuaries have calculated.

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[3] Schlitz paid $880,039 on this date in reliance upon the arbitrator's decision. Had the arbitrator decided that the interest from 1981 should have been included, however, this amount would not have satisfied Schlitz's liability, and it would have had to maintain its quarterly schedule of $986,370 payments until the debt was satisfied. Because Schlitz believed that it owed only $880,039 and paid only that amount, it owes the Plan an additional $106,039. However, the figure in this chart is $986,370, since the Court is projecting what *would have* occurred, rather than what *did* occur.

This calculation appears on Page 5 of Schlitz's memorandum, and imposes liability upon Schlitz in the amount of $3,221,371 as of June 6, 1991.

The Plan seems to believe that the fact that the Court ordered prejudgment interest as of July 7, 1988 means that the interest should accumulate on the total amount outstanding as of that date. However, this interpretation is inconsistent with both the purpose of prejudgment interest and the manner in which the parties agreed to settle the debt. Prejudgment interest is imposed to put a party where it would have been had there been no wrongful act in the first place, but should not cause a party to receive more than it would have in the absence of the wrongful act. *See Rivera v. Benefit Trust Life Ins. Co.*, 921 F.2d 692 (7th Cir. 1991). If the Plan was to receive interest on the remaining balance of the debt as of July 7, 1988, it would begin to accrue interest on monies that were not even owed to it on that date. Furthermore, the fact that the parties agreed that the withdrawal liability should be paid over a period of time, rather than in a lump sum, leads the Court to conclude that this regular payment schedule would have continued after the arbitrator's decision, had he decided correctly. The Plan would be able to receive interest on Schlitz's payments only after they had been paid. The July 7 date, far from being the date from which prejudgment interest should be calculated on the remainder of the debt, is merely the date after which prejudgment interest should be added to the quarterly payments once they have not been paid in a timely manner.

POST-JUDGMENT INTEREST

The next issue involves the characterization of the judgment entered by the Clerk of Court on June 6, 1991 in this case. Schlitz claims that the judgment was a final judgment regardless of its failure to designate a money amount of damages, but the Plan argues that a judgment does not become final until a money judgment has been

entered. Because it is clear from the disputes arising over the issue discussed previously that the June 6, 1991 judgment did not dispose of all of the issues in the case, the Plan contends that the judgment issued on June 6, 1991 was not final and therefore prejudgment interest, rather than post-judgment interest, should accrue up to today's *Decision and Order*. Since the rate for prejudgment interest is higher than the rate for post-judgment interest, it is logical for the Plan to advocate this theory.

The post-judgment interest statute, 28 U.S.C. § 1961, provides that "interest shall be calculated from the date of the entry of the judgment" at the treasury bill rate. The Court finds that the entry of the final judgment in this case was June 6, 1991, at which time the Court upheld the arbitrator's findings. The substance of the June 6 *Order* is intact even after today's decision, which merely clarifies the earlier *Order*.

The Plan cites to *Kaiser Aluminum & Chemical Corp. v. Bonjorno,* 494 U.S. 827 (1990) in support of its characterization of the 1991 judgment as not final. In *Kaiser,* the district court granted a directed verdict at the first trial, which was reversed by the Third Circuit Court of Appeals. At the ensuing trial, the jury found for the plaintiff, and a judgment was entered on August 22, 1979. The district court granted the defendant's motion for a retrial on the issue of damages. The jury returned its verdict on the damages trial on December 2, 1981, and the judgment was entered two days later. *Id.* at 830. The Supreme Court rejected the plaintiff's argument that post-judgment interest should be calculated from the date of the first entry of judgment, after the first trial, holding that "[w]here the judgment on damages was not supported by the evidence, the damages have not been 'ascertained' in any meaningful way." *Id.* at 836. *Kaiser's* holding stands in part for the principle that post-judgment interest may not be awarded on a judgment that is later reversed.

Under the facts of the current case, the Court will not issue a decision today which negates the effect of the decision issued in June of 1991. Rather, today's *Order* clarifies the scope of the judgment. Although the Plan's motion to amend the judgment was granted in part on June 3, 1992, the substance of the June 6, 1991 *Order* was not affected. The June 3, 1992 *Order* merely authorized the parties to attempt to reach an agreement on the dollar amount of 1981 interest to which the Plan was entitled and determined that the Plan was entitled to prejudgment interest after July 7, 1988. Because the June 6, 1991 *Order* still binds the parties, the Plan's reliance upon *Kaiser* is misplaced.

In a case with facts similar to those in the present case, the Sixth Circuit held that post-judgment interest should begin to run on the date of the original judgment, not the date of the modified judgment. In *United States v. Bank of Celina,* 823 F.2d 911 (6th Cir. 1986), the court remarked that in cases where the district court's judgment is modified, not reversed, by the appellate court, post-judgment interest is calculated based upon the date of the district court's judgment. It went on to state:

> The result should be no different when the district court modifies its own judgment, since the underlying rationale for the rule is that the date of the original judgment is controlling because that is when the correct award *should have been* entered. The fact that a district court's judgment was modified does not result in an entirely new judgment.

Id. at 914 (emphasis in original).

Neither party has provided the Court with any controlling law on this issue, and the Court is unable to locate any other cases which address *Bank of Celina* precisely. However, *Merit Insurance Co. v. Leatherby Insurance Co.,* 728 F.2d 943 (1984), *cert. denied,* 494 U.S. 918 (1984)

provides that post-judgment interest should accrue from the date of the district court's original judgment when that judgment was set aside by the district court and later reinstated pursuant to the Seventh Circuit's mandate. In light of this holding, which is consistent with the Sixth Circuit's rationale, the Court finds *Bank of Celina* to be persuasive and shall adopt it.

The Plan protests that the June 6, 1991 *Order* is not final under the Federal Rules of Civil Procedure because a sum certain was not defined in it. However, the Court believes that the sum was readily ascertainable by actuaries. Indeed, the history of the case after June 6, 1991 bears out this theory. Schlitz and the Plan were able to agree on a dollar amount which signified the 1981 interest. Their disagreement on how the payments should have been structured arises, for the most part, on the Court's ambiguous language in the 1991 *Order* which declared that prejudgment interest would be applied from July 7, 1988; the *Order* should have provided that prejudgment interest would be applied to each monthly payment after July 7, 1988 as of its due date.

The Court finds that the substantive issues in this case were resolved by the June 6, 1991 *Order*, and that the final judgment was entered that same day by the Clerk of Court. The motion resolved on June 3, 1992 can be characterized as a "post-judgment motion" and was brought by the Plan as a motion to amend judgment pursuant to Federal Rule of Civil Procedure 59. The pendency of a post-judgment motion will not stop post-judgment interest from accruing on the underlying judgment. *Fishman v. Estate of Wirtz*, 609 F.Supp. 982 (N.D.Ill. 1985), aff'd in part, rev'd in part, and vacated in part on other grounds, 807 F.2d 520 (7th

Cir. 1986).[4] Therefore, the Court finds that post-judgment interest in this matter should be imposed after June 6, 1991.

For the reasons set forth herein, the Court hereby **ORDERS** that:

1) prejudgment interest shall accrue upon Schlitz's overdue payments as of the date each payment became due, for all payments owing after July 7, 1988; and

2) the *Order* issued on June 6, 1991 is a final order, and post-judgment interest should begin to accrue after that date.

SO ORDERED this 20th day of October, 1992, at Milwaukee, Wisconsin.

ROBERT W. WARREN
SENIOR UNITED STATES
DISTRICT JUDGE

[4] The district court in *Fishman*, faced with the identical issue concerning the imposition of post-judgment interest, appears at first glance to have taken a position contrary to the one taken by this Court today. In *Fishman*, the court entered findings of fact and conclusions of law on June 28, 1984, and a judgment was entered based upon these findings on November 21, 1984. The court refused to apply post-judgment interest from June 28 and ruled that the final judgment was entered on November 21 based upon the fact that money damages were not readily ascertainable from the previous decision. However, the result is actually consistent with the Court's ruling today. A damages award was entered on November 21, 1984 which was based upon the district court's previous findings. These proceedings can be accurately analogized to the Court's 1991 *Order* which was based upon the arbitrator's previous decision. The opinion published at 609 F.Supp. 982 stems from Rule 59 motions, which were obviously filed after the November 21 judgment. The district court's refusal to toll the accrual of post-judgment interest during the pendency of the motions creates the identical result as this Court's imposition of postjudgment interest on June 6, 1991 rather than today.

EXHIBIT E

EXHIBIT A

OPINION AND AWARD
INTRODUCTION

This is a multiemployer pension plan withdrawal liability case which began in 1981. One might ask now it comes to be that a withdrawal liability case which began in 1981 is being decided by an Arbitrator in 1988. A brief explanation is in order.

The Jos. Schlitz Brewing Company (Schlitz) withdrew from the Milwaukee Brewery Workers' Pension Plan (Plan) in September of 1981. By a letter dated September 29, 1981, the Plan demanded withdrawal liability payment from Schlitz in the amount of $41,031,406. A payment schedule was attached, requiring a first payment on November 1, 1981. On March 19, 1982, Schlitz demanded that the Plan arbitrate with Schlitz to determine Schlitz's withdrawal liability and, on that same day, Schlitz filed a suit in the United States District Court for the Eastern District of Wisconsin against the Pension Benefit Guaranty Corporation (PBGC); the Plan; the Joint Committee of the Plan and the individual members of the Joint Committee in relation to Schlitz's withdrawal liability. On December 28, 1984, two years and eight months after the suit was filed, Judge Robert W. Warren, U.S. District Judge, dismissed Schlitz's complaint.

On April 5, 1985, Schlitz and the Plan mutually agreed to appoint the undersigned as sole Arbitrator in the withdrawal liability dispute and the undersigned accepted the appointment.

Following a pre-arbitration conference, the Plan filed with the Arbitrator two Motions and a Request For Ruling. On November 7, 1985, the Arbitrator held a Hearing for the purpose of hearing and deciding the two Motions and Request For Ruling. The Arbitrator ruled on these Motions

and the Request For Ruling in a written Decision mailed to the parties on November 21, 1985.

During 1986, it appears that the parties were deposing witnesses and preparing for the Arbitration Hearing. The Arbitration Hearing took place in Milwaukee, Wisconsin for five (5) days between August 10, 1987 and August 14, 1987. This was followed by two and one-half (2½) days of additional Hearing in Romulus, Michigan from September 29, 1987 through October 1, 1987.

Following the Hearings, the Plan and Schlitz submitted Post-Arbitration Briefs and Post-Arbitration Reply Briefs. In addition, the Plan and Schlitz were engaged, with their Actuaries, in working out certain calculations which had been requested of them by the Arbitrator. These calculations were received by the Arbitrator on April 20, 1988.

The foregoing history explains the passage of time between 1981 and 1988.

This Arbitration has produced an enormous volume of reading. There were 1,000 pages of Transcripts, Pre and Post Arbitration and Reply Briefs, Appendices and boxes of Exhibits. To keep this Opinion and Award to a reasonable length, the Arbitrator has decided to make is as succinct as possible. Sparing use has been made of references and citations to other cases.

STATEMENT OF FACTS

The following Statement of Facts was stipulated by the attorneys for the Plan and Schlitz.

The Parties

1. The Jos. Schlitz Brewing Company (hereinafter referred to as "Schlitz") was at all times material hereto a

Wisconsin corporation with its principal place of business located in Milwaukee, Wisconsin.

2. The Milwaukee Brewers' Association (hereinafter referred to as the "Association") was at all times material hereto a voluntary association of breweries which were engaged in, among other things, the production and sale of beer.

3. The Miller Brewing Co. (hereinafter referred to as "Miller") is a corporation with its principal place of business located in Milwaukee, Wisconsin.

4. The Pabst Brewing Co. (hereinafter referred to as "Pabst") is a corporation with its principal place of business located in Milwaukee, Wisconsin.

5. Brewery Workers' Local Union No. 9, D.A.L.U. (now U.A.W.), A.F.L.-C.I.O. (hereinafter referred to as "Local 9"), was at all times material hereto the labor organization which represented the Milwaukee brewery workers.

6. The Milwaukee Brewery Workers' Pension Plan (hereinafter referred to as the "Plan") is a multiemployer, defined benefit pension plan, with its principal office in Milwaukee, Wisconsin. The Plan was established March 1, 1954, by an agreement dated August 16, 1954 between Local 9 and the participating employers.

THE ASSOCIATION

7. The Association was formed to prepare for and negotiate collective bargaining agreements with various labor organizations, including Local 9.

8. The Association was organized as follows: The chief executive officers of the participating breweries were on the Proprietors' Committee. The Proprietors' Committee appointed the Chairman and membership of the Labor Committee. The Labor Committee was charged with the

task of preparing for and negotiating collective bargaining agreements with various labor organizations, including Local 9.

9. On October 28, 1958, the participating members of the Association agreed to a defined set of principles, rules and procedures (hereinafter referred to as the "Association Agreement"). The members of the Association at the time were the Blatz Brewing Co., A. Gettelman Brewing Co., Independent Milwaukee Brewery, Miller, Pabst and Schlitz.

10. The Association Agreement, which contains no expiration date, was renewed from year to year and governed the conduct of the participating members of the Association.

11. The Association Agreement contained eleven basic commitments, including the following:

> All decisions and action taken by the Proprietors' Committee and by the Labor Committee shall be by unanimous vote of the respective committee, with each brewery having a reasonable opportunity to cast its vote on the question.

12. The Association Agreement also established the negotiating procedures which governed the conduct of the Association's Labor Committee. Those procedures included the following:

> (1) All questions before the Labor Committee must be decided by unanimous vote of the members present. Every member shall be given adequate notice of all meetings.
>
> (2) No bargaining proposal shall be made or accepted without prior unanimous consent of Labor Committee members.
>
> (3) Any Labor Committee member may dissent, thereby requiring referral to the Proprietors' Committee; every effort shall be made to resolve

> disagreements, and refer to the Proprietors' Committee only such matters as might involve major policy.

THE PLAN

13. The Plan was established and is maintained pursuant to successive collective bargaining agreements between Local 9, and certain brewing companies.

14. As of January 1, 1981, the Plan had three employer plan sponsors and contributors: Miller, Pabst and Schlitz.

15. The brewing companies, known as the "Brewery Proprietors", bargained jointly with Local 9 until January 21, 1981, when Schlitz gave notice of its withdrawal from multiemployer bargaining. Thereafter, in the 1981 labor negotiations with Local 9, Miller and Pabst negotiated jointly and Schlitz negotiated alone.

16. The Plan could only be amended by the "mutual agreement of the Union and the Employers", as set forth in the Plan Document.

17. During the period from 1954 to 1979, the Plan was never amended without the agreement of all of the participating employers.

18. During the period from 1954 to 1979, the Plan was amended eleven times by the mutual agreement of the Union and the participating employers, effective March 1, 1954; January 1, 1956; June 1, 1959; June 1, 1964; June 1, 1967; June 1, 1969; June 1, 1971; June 1, 1973; June 1, 1975; June 1, 1977 and June 1, 1979.

19. The Plan was operated and administered by a Joint Committee consisting of members appointed by Local 9 and the participating employers. The President of Local 9, Kenneth Mueller, was also Chairman of the Joint Committee.

20. The Joint Committee was granted the power necessary for the proper administration of the Plan, as set forth in the Plan Document.

21. The Joint Committee, however, did not have the power to amend the Plan.

22. The Plan's counsel discussed the implications of MPPAA at a specially called meeting of the Joint Committee on January 16, 1981. It was decided at the meeting that Local 9 and the Employers should be contacted regarding the new law. At the Joint Committee's January 19, 1981 meeting, the Committee decided that Plan counsel should draft a letter for the Committee to send to Local 9 and the Employers notifying them of the effect of the new law.

23. At the Joint Committee's March 13, 1981 meeting, the Committee approved Plan counsel's letter for mailing to Local 9 and the Employers. The letter advises Local 9 and the Employers of the effect of MPPAA and indicates that the presumptive method of determining employer withdrawal liability will apply unless the Plan is amended.

THE 1979 CONTRACT NEGOTIATIONS BETWEEN THE ASSOCIATION AND LOCAL 9

24. The 1979 contract negotiations with Local 9 were the last negotiations that Schlitz participated in as a member of the Association. The remaining members of the Association at that time were Miller and Pabst.

25. During the course of these negotiations, a dispute arose among the members of the Association's Labor Committee regarding Local 9's wage demands.

26. The representative from Schlitz claimed that Local 9's wage demands exceeded the President's guidelines, as established by COWPS, and that no joint proposal in excess of the guidelines should be made. Miller and Pabst disagreed.

27. A Proprietors' Committee meeting was held on May 23, 1979 to resolve the disagreement. However, the chief executive officers were unable to reach agreement at the meeting.

28. This was the first time that the members of the Proprietors' Committee had been unable to work out mutually agreeable proposals to be made to Local 9.

THE 1981 CONTRACT NEGOTIATIONS BETWEEN SCHLITZ AND LOCAL 9

29. On January 21, 1981, Schlitz gave timely notice to Miller, Pabst and Local 9 of its withdrawal from the Association and joint bargaining with the Brewery Proprietors of Milwaukee, Wisconsin. Henceforth, Schlitz would negotiate separately with Local 9.

30. Notwithstanding its separate bargaining on all issues, Schlitz also gave notice on January 21, 1981, that it would maintain its representation on the Joint Committee and continue to participate in the Plan.

31. Charles Mazza was the Schlitz representative on the Joint Committee. He attended meetings of the Joint Committee until his resignation on August 14, 1981.

32. Pursuant to the 1979-1981 labor contract, on March 9, 1981, Schlitz gave timely notice to Local 9 of its desire to terminate or modify the existing agreement between the parties.

33. On March 20, 1981, Local 9 wrote to Schlitz (and Miller/Pabst) providing notice of its desire to amend the collective bargaining agreement and to reopen the Pension Agreement.

34. On April 7, 1981, Schlitz and Local 9 began separate, bargaining on all issues.

35. On May 20, 1981, Local 9 notified Miller, Pabst and Schlitz of a meeting to be held on May 22, 1981 "for the

purpose of negotiating changes in the Milwaukee Brewery Workers' Pension Plan." Schlitz responded in a letter dated May 21, 1981.

36. The existing collective bargaining agreement between Schlitz and the Union expired on May 31, 1981. Schlitz and the Union negotiated to an impasse.

37. The Union went out on strike on June 1, 1981.

38. On July 31, 1981, Schlitz announced that it was permanently closing its Milwaukee plant.

39. On August 14, 1981, the Schlitz representative on the Joint Committee gave notice of his resignation from the Joint Committee.

40. On September 29, 1981, the Plan sent a letter to Schlitz demanding the payment of $41,031,406.

THE 1981 NEGOTIATIONS BETWEEN MILLER/PABST AND LOCAL 9

41. On March 20, 1981, Local 9 wrote to Miller and Pabst (Schlitz was also given the same notice) providing notice of its desire to amend the collective bargaining agreement and to reopen the pension Agreement.

42. On March 25, 1981, Miller and Pabst began joint bargaining with Local 9 with respect to revisions to the 1979-1981 agreement.

43. On May 20, 1981, the President of the Union notified Miller, Pabst and Schlitz of a meeting to be held on May 22, 1981 "for the purpose of negotiating changes in the Milwaukee Brewery Workers' Pension Plan."

44. On May 22, 1981, Miller, Pabst and Local 9 met and agreed to a Memorandum of Understanding dated May 22, 1981 regarding the Plan (hereinafter referred to as the "5/22 Memorandum").

45. The 5/22 Memorandum was never proposed to Schlitz by Miller, Pabst or Local 9, nor did Schlitz and Local 9 reach any agreement with respect to the subject matter of that memorandum.

46. On May 29, 1981, Miller, Pabst and Local 9 met again and agreed to a second Memorandum of Understanding dated May 29, 1981 regarding the Plan (hereinafter referred to as the "5/29 Memorandum").

47. The 5/29 Memorandum was never proposed to Schlitz by Miller, Pabst or Local 9, nor did Schlitz and Local 9 reach any agreement with respect to the subject matter of that memorandum.

48. Prior to May 31, 1981, Local 9 reached agreement with Pabst and Miller on a new collective bargaining agreement.

THE DETERMINATION OF THE WITHDRAWAL LIABILITY OF SCHLITZ

49. The Joint Committee met on May 18, 1981, June 17, 1981 and July 17, 1981. The Joint Committee took no action with respect to the 5/22 and 5/29 Memoranda of Understanding at a those meetings.

50. On June 17, 1981, the Joint Committee terminated its legal counsel.

51. On August 17, 1981, the Joint Committee directed the Plan's actuary to calculate the withdrawal liability of Schlitz based upon the 5/22 Memorandum and the 5/29 Memorandum.

52. The actuary reported the results of his calculations to the Joint Committee on September 15, 1981.

53. On September 29, 1981, the Joint Committee sent a letter to Schlitz demanding payment of $41,031,406.

54. On October 2, 1981, Schlitz wrote to the Plan requesting information on the calculation of its withdrawal liability.

55. On October 19, 1981, the Joint Committee responded to the Schlitz letter of October 2, 1981.

56. On October 19, 1981, the Joint Committee was presented with the amendments to the Plan as drafted by counsel for the Plan.

57. On October 29, 1981, Schlitz made the first payment on its employer withdrawal liability. The payment was due on November 1, 1981. Schlitz has made all subsequent payments on a timely basis.

58. On November 6, 1981, Schlitz requested further information from the Plan.

59. On November 16, 1981, the Joint Committee responded to the Schlitz letter of November 6, 1981.

60. On December 23, 1981, Schlitz sent a letter to the Plan.

61. On March 19, 1981, Schlitz sent a letter to the Plan requesting arbitration.

PRELIMINARY ISSUES

Shortly after the appointment of the Arbitrator, the Plan submitted to the Arbitrator two Motions and a Request for Ruling. The Motions were:

1. A Motion to Dismiss the Arbitration Proceeding;
2. A Motion to Limit Issues For Arbitration [to eliminate the issue of the constitutionality of the Multiemployer Pension Plan Amendments Act of 1980 (MPPAA) from the Arbitrator];
3. A Request for Ruling on Procedural Matter - Burden of Proof

Schlitz was given notice of these Motions and Request for Ruling and, following the submission of Briefs in support and in opposition to the Motions and Request for Ruling, a Hearing was scheduled by the Arbitrator in Romulus, Michigan for November 7, 1985.

At that time, the Arbitrator ruled on the Motions and Request for Ruling and issued his decisions in writing, which were mailed to the parties on November 21, 1985. The following material discusses the two Motions and the Request for Ruling and reports the decisions of the Arbitrator.

1. Motion to Dismiss Arbitration Proceeding

In substance, the argument of the Plan in support of this Motion was that Schlitz failed to comply with the requirements of 29 USC 1399(b)(2)(A) and, therefore, had lost its right to arbitration. 29 USC 1399(b)(2)(A) provides as follows:

> No later than 90 days after the employer receives the notice described in paragraph (1), the employer—
>
> (i) may ask the plan sponsor to review any specific matter relating to the determination of the employer's liability and the schedule of payments,
>
> (ii) may identify any inaccuracy in the determination of the amount and of the unfunded vested benefits allocable to the employer, and
>
> (iii) may furnish any additional relevant information to the plan sponsor.

The notice referred to above as "described in paragraph (1)" is found in 29 USC 1399(b)(l), which states as follows:

As soon as practicable after an employer's complete or partial withdrawal, the plan sponsor shall—

(A) notify the employer—
  (i) the amount of the liability, and
  (ii) the schedule for liability payment, and
(B) demand payment in accordance with the schedule.

Admittedly, Schlitz sent a letter to the Plan on December 23, 1981. This letter met the time requirements of 29 USC 1399(b)(2)(A), but the Plan argued that the letter's contents did not comply with the terms of 29 USC 1399(b)(2)(A). The letter is as follows:

Brewery Workers' Pension Plan
2189 North 48th Street
Milwaukee, Wisconsin 53208

Attention: Katherine M. Roback, Secretary

Dear Ms. Roback:

In accordance with the procedures suggested in your letter dated December 3, 1981, we hereby request a determination by the Joint Committee of the employer withdrawal liability chargeable to Schlitz under the "presumptive method" for calculating such liability (under Section 4211(b) of the Employee Retirement Income Security Act of 1974, as amended ("ERISA")). We believe that the presumptive method is the only method which may correctly be applied to Schlitz under applicable law. The Joint Committee's determination of the Schlitz withdrawal liability under the presumptive method should identify any differences which may exist between the amounts of the liability as determined under the direct attribution method asserted by the Joint Committee to be applicable and the presumptive method. Therefore, we hereby specifically request from you the following:

1. A statement concerning the withdrawal liability of Schlitz under the presumptive method set forth in Section 4211(b) of ERISA and the underlying calculations.

2. The payment schedule applicable to Schlitz under the presumptive method and the underlying calculations.

3. The calculations used to determine the unfunded vested benefits of the plan for purposes of determining Schlitz's withdrawal liability, and the actuarial assumptions and methods used in connection therewith have previously been furnished to us. If any changes to those calculations would result from use of the presumptive method, then we request those calculations, as revised.

4. A statement concerning the Joint Committee's decision as to which method of calculating employer withdrawal liability applies to Schlitz and an explanation of the basis for the decision.

Very truly yours,

JOS. SCHLITZ BREWING COMPANY

(signed)
H.L. Fessler
Vice President, Labor Relations

The Arbitrator ruled on November 7, 1985 that this letter, taken together with additional facts, satisfied the requirements of 29 USC 1399(b)(2)(A). The Arbitrator so ruled because he was convinced that, first, the exchange of communications between Schlitz and the Plan, prior to December 23, 1981 (letters from Schlitz to the Plan dated October 2, 1981; November 6, 1981 and from the Plan to Schlitz dated October 19, 1981; November 16, 1981), taken

together with the letter of December 23, 1981, communicated to the Plan that there was a specific dispute between Schlitz and the Plan over the determination of the amount of Schlitz's liability, the amount of unfunded vested benefits and the schedule of payments.

Second, inasmuch as a suit between Schlitz and the Plan had been in a United States District Court prior to the appointment of the Arbitrator, the Arbitrator believed it to be appropriate that he review and consider the Decision of Judge Warren in the case. In Judge Warren's Opinion dismissing Schlitz's suit on Motion of the PBGC and the Plan, Judge Warren discussed the role of arbitration as a condition precedent to the right of Schlitz to bring suit. Judge Warren repeated the long settled rule that no one is entitled to judicial relief for a supposed or threatened injury until the prescribed remedy has been exhausted. He repeated the several reasons which are cited as the bases of the "exhaustion doctrine".

Among the reasons are the following: (1) that the rule allows an administrative agency to use its discretion and apply its expertise to the dispute; (2) that the rule minimizes piecemeal appeals of agency actions; (3) that the administrative tribunal can make findings of fact upon which a court may later rely; (4) that the complainant's rights may be vindicated at the administrative level and (5) that the rule gives deference to the will of Congress where a Federal statute specifies that an administrative tribunal should serve as the initial forum for dispute resolution.

Judge Warren then pointed out that arbitration has been treated as equivalent to an administrative tribunal for purposes of the exhaustion doctrine.

Judge Warren concluded that, in the case before him, "it would be possible for an administrative tribunal to resolve the factual issues and develop a record that would result in judicial economy should this matter later proceed to District Court. The purposes of the exhaustion doctrine

will be served by requiring the Plaintiff to exhaust its administrative remedies before commencing an action in this Court".

The Arbitrator read Judge Warren's Opinion as directing that Schlitz take its case to arbitration. In light of Judge Warren's words, the Arbitrator believes that Judge Warren did not intend to dismiss the case before him for the purpose only of having an arbitrator decide that Schlitz was not entitled to arbitration.

It should be pointed out that, to the best of the Arbitrator's ability to discover, neither the Plan nor the PBGC, in documents and arguments presented to Judge Warren, ever asserted that Schlitz had lost its right to proceed to arbitration under 29 USC 1401.

Third, Schlitz had timely begun making its withdrawal liability payments, as demanded by the Plan, the first one, in the amount of $986,370.00, having been made on October 27, 1981. Thus, Schlitz was complying with a critical statutory requirement prior to and pending the arbitration.

The Plan, in support of its Motion to Dismiss, relied mainly on three cases. These are:

1. *Niagara Paper Corp v Pager Industry Pension Fund*, 5 EBC 1496 (D Minn, 1983)
2. *Board of Trustees of the Western Conference of Teamsters Pension Trust Fund v Thompson Building Materials, Inc*, No. CV 82-5377-DHH, U.S. District court for the Central District of California, Findings of Fact and conclusions of Law filed April 29, 1982, app. dis, aff'd 749 F2d 1395 (9th Cir. 1984)
3. *William Evans v Frito-Lay, Inc*, Case No. 83-2337, U.S. District court for the Northern District of Ohio, Opinion filed 9/06/83

In the opinion of the Arbitrator, each of these three cases is factually distinguishable from the instant case.

In *Niagara*, after receiving its notice of withdrawal liability from the plan, the employer wrote back to the plan saying it had no reason to feel that the indicated liability and the installment schedule are inappropriate. The employer then requested four items of additional information. The Court held that this letter did not meet the requirements of 29 USC 1399(b)(2)(A).

In *Thompson,* the employer, on receipt of the notice from the plan of its withdrawal liability, sent a letter to the plan protesting the liability and demanding arbitration. The plan responded by informing Thompson that his demand for arbitration was ineffective and advising Thompson of the steps to be taken to initiate arbitration. Thompson never initiated arbitration or paid any of the withdrawal liability.

Evans is the case which most solidly supports the Motion of the plan. Here the employer sent a letter to the plan which the Court characterized as merely requesting information. With this characterization, the Court tested the letter against the words of 29 USC 1399(b)(2)(A) and found that the words of the letter did not match the words of the statute. It should be pointed out, however, that in this case, the employer never began making the scheduled withdrawal payments, which were overdue when the demand for arbitration was finally made by the employer.

At the conclusion of the Arbitration Hearing, the Plan renewed its Motion for Dismissal of the arbitration. The Arbitrator now reaffirms his Decision of November 7, 1985 and denies the Plan's Motion to Dismiss the Arbitration.

2. Motion to Limit Issues for Arbitration.

The Arbitrator granted this Motion for the following reason. The issue of whether MPPAA, 29 USC 1381-1461,

is unconstitutional is clearly an issue of law and issues of law conventionally are to be decided by the courts. Therefore, the Arbitrator decided that this issue should be reserved for a court if, following the arbitration, either of the parties decides to continue litigation in this matter. The Arbitrator now reaffirms his Decision of November 7, 1985 and grants the Plan's Motion to Limit Issues for Arbitration.

3. Request for Ruling on Procedural Matter - Burden of Proof

The Plan presented the Request for ruling based upon the fact that, apparently, the issue of Burden of Proof in the arbitration remained unresolved between the Attorneys for the Plan and Schlitz as they conferred to agree upon a variety of matters related to the arbitration. Apparently, the attorneys for Schlitz desired to challenge the constitutionality of 29 USC 1401(a)(3)(A), which provides as follows:

> For purposes of any proceeding under this section, any determination made by a plan sponsor under Sections 1381 through 1399 of this title and section 1405 of this title is presumed correct unless the party contesting the determination shows by a preponderance of the evidence that the determination was unreasonable or clearly erroneous.

The Arbitrator deferred a ruling on Burden of Proof with the following explanation:

The Arbitrator stated that he will comply with 29 USC 1401(a)(3)(a), as quoted above. As to any subsidiary issues which may arise during the course of the arbitration, the Arbitrator stated that he will, as a general proposition, require the party who advances an allegation or assertion to establish to the Arbitrator that the allegation or assertion has been convincingly proven.

ISSUE I

WAS THE PLAN AMENDED AS A RESULT OF THE MEMORANDA OF UNDERSTANDING OF MAY 22 AND MAY 29, 1981 BETWEEN PABST, MILLER AND LOCAL 9, SO AS TO BE APPLICABLE TO SCHLITZ AND, THEREFORE, TO VALIDLY REQUIRE THE USE OF THE DIRECT ATTRIBUTION METHOD IN THE CALCULATION OF THE WITHDRAWAL LIABILITY OF SCHLITZ?

At first blush, there seems to be a relatively simple and direct answer to the foregoing question. Article IX of the Plan specifies that: "The Plan may be modified, altered, or amended upon mutual agreement of the Union and the Employers . . ." Inasmuch as it is a stipulated fact that Schlitz did not participate in the meetings of May 22 and May 29, 1981 and never agreed to the Memoranda of Understanding dated on those two dates, it would appear that the amendments to the Plan set forth in the Memoranda of Understanding of May 22 and May 29, 1981 were not made upon the mutual agreement of the Union and the Employers. This conclusion rests upon an interpretation of the words "mutual agreement". If those words are interpreted to mean unanimous agreement, then it is clear that unanimous agreement did not occur, since Schlitz, one of the Employers, did not agree to the amendments.

Is it possible that the words "mutual agreement" have some meaning other than unanimous agreement? Conceivably, but the Arbitrator thinks not. Black's Law Dictionary (Third Edition) defines "agreement" as "the union of two or more minds in a thing done or to be done; a *mutual assent* to do a thing." Thus, the word "mutual" appears to be an inherent element of the word "agreement".

The use of the words "mutual agreement of the Union and the Employers" in the Plan, in the opinion of the Arbitrator, requires that the Union and all the Employers agree to any amendment of the Plan.

Confirmation of this interpretation is found in the fact that, in the history of this Plan, all amendments prior to those made on May 22 and May 29, 1981 were made by the unanimous agreement between all the Employers and the Union.

It follows, then, that if the Memoranda of May 22 and May 29, 1981, by which the direct attribution method for the calculating of withdrawal liability was adopted, are not binding on Schlitz because they were not made upon the mutual agreement of the Union and the Employers, the direct attribution method cannot be used in the calculation of the withdrawal liability of Schlitz, even though the technical date of Schlitz's withdrawal from the Plan was subsequent to May 29, 1981.

However, the Plan has attempted to meet the above suggested response to Issue I by proving that:

1. The Union and the Employers were fiduciaries of the Plan.
2. Schlitz was obligated, by reason of its fiduciary position, to attend the meetings of May 22 and May 29, 1981, at which the Plan amendments were adopted.
3. The acting fiduciaries of the Plan who met on May 22 and May 29, 1981, were required by their fiduciary responsibilities to adopt the direct attribution method of calculating withdrawal liability.
4. The direct attribution method of calculating withdrawal liability is the preferred and correct method of calculating withdrawal liability for the Plan in 1981.
5. For the foregoing reasons, the absence of an appropriate Schlitz representative or representatives from the meetings of May 22 and May 29, 1981 could not prevent the legal adoption of the direct

attribution method as the Plan's method of calculating withdrawal liability and that, therefore, Schlitz is bound to pay withdrawal liability calculated by the direct attribution method.

The Plan attempted to prove its contentions primarily through the testimony of Jeffrey Clayton, Esq. Clayton appeared as an expert witness on behalf of the Plan. Clayton is a lawyer who was the Administrator of the Office of Pension and Welfare Benefits in the United States Department of Labor from December 1981 until September 1983. Clayton is now in private practice with a law firm in Salt Lake City, Utah.

Clayton testified that, as Administrator of the Office of Pension and Welfare Benefits, he was responsible for enforcing the provisions of Title I, of ERISA. As Administrator, Clayton had the responsibility of determining whether suit should brought for alleged violations of Title I. Most of the cases he passed on involved alleged violations of the fiduciary standards set forth in ERISA. These cases involved different kinds of violations of fiduciary standards and occurred in various places in the United States.

Since his return to private practice, Clayton has specialized in ERISA work. Perhaps 70% to 80% of his present work is in this field. He has been appointed as an independent representative of plans. He has served as an independent fiduciary. He has appeared in cases as an expert witness. Be has appeared at numerous conferences and seminars, and generally his speeches deal with compliance with the fiduciary standards of ERISA.

Having been engaged as an expert witness by the Plan, Clayton had reviewed a number of documents relating to this case.

Clayton's pertinent testimony can be summarized as follows:

1. A person who retains the power to amend a plan is a fiduciary. In exercising the power to amend the Plan, as provided in Article IX of the Plan, the Union and Employer representatives would be exercising a fiduciary function. Any type of amendment of the Plan would be an exercise of fiduciary function.

2. ERISA is like a template which has been imposed on labor relations, so that what once were purely collective bargaining decisions are now fiduciary decisions.

3. Selection of the method of determining withdrawal liability under MPPAA would involve a fiduciary decision, and the representatives of the Union and Pabst and Miller were acting as fiduciaries when they adopted the Memoranda of May 22 and May 29, 1981.

4. The adoption of the direct attribution method for calculating withdrawal liability by the representatives of the Union and Pabst and Miller by the Memoranda of May 22 and May 29, 1981 was mandated by Section 404 of ERISA, because Section 404 requires the fiduciaries to act prudently solely in the interest of the Plan participants and beneficiaries.

5. This is a textbook case calling for the adoption of the direct attribution method. The Plan had good records, the industry was declining, the number of employees had gradually diminished, the Plan was not in good financial shape and the direct attribution method attempts to allocate withdrawal liability to the employer which created the liability. The direct attribution method broadens the base of economic support for the plan and, therefore, is consistent with the fiduciary obligation to operate the plan in the sole and exclusive interest of the participants and beneficiaries.

6. If the representatives of Schlitz received a notice of the meeting of May 22, 1981 and knew that the meeting was called for the purpose of discussing methods of computing withdrawal liability, they would have had a fiduciary duty to attend the meeting, and if a representative of Schlitz had attended the meeting of May 22, 1981, the representative would have had a fiduciary duty to vote for the direct attribution method.

7. If Article IX of the Plan is interpreted to require unanimous consent of the Union and the Employers to amend the Plan, then the amendment process is imprudent and unenforceable.

8. In Clayton's opinion, the Memoranda of May 22 and May 29, 1981 executed by the Union, Pabst and Miller validly amended the Plan, even though Schlitz did not agree to the Amendment, and the Amendment therefore is binding on Schlitz.

DISCUSSION

To be persuaded that Clayton's opinion that the Plan was validly amended by the Memoranda of May 22 and May 29, 1981, the Arbitrator believes that support for the opinion should be found, if possible, in ERISA or in judicial decisions. Looking first at ERISA, the Arbitrator finds a definition of a fiduciary in Section (21)(A), 29 USC 1002(21)(A), which is as follows:

> 21) (A) Except as otherwise provided in subparagraph (B), a person is a fiduciary with respect to a plan to the extent (i) he exercises any discretionary authority or discretionary control respecting management of such plan or exercises any authority or control respecting management or disposition of its assets, (ii) he renders investment advice for a fee or other compensation, direct or indirect, with respect to any moneys or other property of

> such plan, or has any authority or responsibility to do so, or (iii) he has any discretionary authority or discretionary responsibility in the administration of such plan.

This language is noteworthy in that it seems focused on administration of plans. The language of the statute refers to discretionary authority, discretionary control, management or disposition of assets and investment advice. The creators of the Plan seem to have given to the Joint Committee of the Plan functions which easily fit within the definition of fiduciary as found in Section (21)(A) of ERISA. 29 USC 1002(21)(A). (See Plan, Article XII.) But the Joint Committee was not empowered to amend the Plan.

In its Briefs, the Plan vigorously argued that the so-called "primary decision makers" were also fiduciaries of the Plan under ERISA. The "primary decision makers, as so characterized by the Plan, were the Union and the Employers. The theory of the Plan is that these "primary decision makers" assumed and retained authority and control over the Plan's management and administration. The Arbitrator declines to accept this interpretation of the facts. As the Arbitrator sees it, the Union and the Employers created the Plan. They reserved the power to amend the Plan to themselves. Otherwise, they turned the administration of the Plan over to the Joint Committee. (See Plan, Article XII.) The reservation of the power to amend the Plan was a reservation of a collective bargaining power. The Arbitrator rejects the characterization of the Union and the Employers as fiduciaries.

Unquestionably, representatives of the Union and the Employers who were appointed by the Union and the Employers with authority to take specific actions could be fiduciaries if the actions in question involved the administration of the Plan or handling its assets. This is consistent with the testimony of Clayton, who testified that whether a person is a fiduciary is to be determined by the specific

facts surrounding the action in question. Nor can the fact that a Union or Employer representative is a fiduciary as to a particular act or function endow him with authority and power to perform an act reserved by his principal to the principal itself.

The many cases which were cited by the Plan in its Briefs in support of its claim than Schlitz was a fiduciary and, therefore, assertedly required to attend meetings called to amend the Plan and assertedly required to vote to amend the Plan are not apposite. They are cases in which individuals who were either employer or union representatives engaged in plan functions or administration, or dealt with plan assets, and were therefore deemed to be fiduciaries with respect to the acts in question.

In *United Independent Flight Officers, Inc. v United Air Lines, Inc & Air Line Pilots Ass'n, Int'l*, 756 F2d 1267, 1268 (7th Cir. 1985) the Court said:

> (2) To impose fiduciary status on negotiators would unreasonably cramp legitimate negotiations, presumably forcing negotiators to arbitrarily favor a single group of employees. The concept of negotiator as fiduciary is also wholly inconsistent with the very fiduciary provisions of ERISA, which were designed to prevent a fiduciary "from being put into a position where he has dual loyalties, and, therefore, he cannot act exclusively for the benefit of a plan's participants and beneficiaries." Amax Coal, 453 U.S. at 334, 101 S.Ct at 2796 (quoting S.R. Conf. Rep. No. 1280, 93rd Cong., 2d Sess. 309, reprinted in 1974 U.S. Code Cong. & Ad. News 4639, 5038, 5089). *We conclude that a union is not a fiduciary while, or merely because, it is negotiating the terms and conditions of future pension benefits, at least where these benefits are not protected under ERISA's vesting and nonforfeitability provisions.* (Emphasis added).

The Arbitrator believes that the legal conclusions contained in the testimony of Clayton, previously set forth, are overstated. It is understandable that an attorney given Clayton's responsibilities in the Department of Labor in the developmental period of 1981-1983 might have an expansive view of the law he was hired to interpret and enforce. The Arbitrator is convinced that accommodation must exist between the massive body of law relating to the process of collective bargaining and the relatively new requirements of ERISA. The legal conclusions of Clayton in effect would result in ERISA wholly swallowing up the process of collective bargaining as it relates to pension plans. (See also, Fillion and Trevilcock, *The Duty To Bargain Under ERISA*, 17 Wm & Mary LR 251 [1975].)

It is now accepted beyond argument that pensions are a mandatory subject of bargaining between Unions and employers. The Plan was created by collective bargaining. The collective bargaining agreement in effect from June 1, 1979 through June 1, 1981, in Article VII, 8, provides as follows:

> 8. The Milwaukee Brewery Workers' Pension Plan shall be maintained in full force and effect until June 1, 1981. In the event that either party to this contract notifies the other in writing not less than sixty (60) days prior to June 1, 1981, of its desire to terminate or modify such Plan, then the parties shall meet to study and negotiate necessary revisions.

It is to be noted that the collective bargaining commitment was only to maintain the Plan until June 1, 1981. For any period after that date, either the Union or the Employers were free to propose changes including, conceivably, the termination of the Plan. It was further stipulated that Schlitz timely and properly withdrew from joint bargaining with Pabst and Miller, and that on April 7, 1981, Schlitz and Local 9 began separate bargaining on all issues.

Clayton conceded that the letter from the Union to Schlitz dated May 20, 1981, announcing a meeting to negotiate changes in the Plan, was not adequately informative. Further, Schlitz responded to the letter of May 20, 1981 with a letter dated May 21, 1981 stating that because Schlitz was aware that a letter identical to that received by Schlitz under date of May 20, 1981 had been sent to Pabst and Miller, Schlitz would not bargain jointly with the other Employers. This letter requested an answer from the Union if the meeting of May 22, 1981 was intended for any purpose other than joint bargaining. No response to this letter was received by Schlitz, and Clayton also conceded that, under this state of facts, it is unclear whether Schlitz was ever properly notified of a meeting to be held on May 22, 1981 which it might have been obligated to attend.

Therefore, taking into account the language on amendments to the Plan; (2) the inclusion in the collective bargaining agreement of reference to the steps to be taken to amend (modify) the Plan; (3) the stipulation that the Joint Committee was not empowered to amend the Plan; (4) the accepted interpretation of the National Labor Relations Act that pensions are a subject of mandatory bargaining; (5) judicial decisions which support the proposition that when unions and employers bargain about pensions, they are not acting as fiduciaries but rather as collective bargaining parties; and (6) that the Union's notice to Schlitz of its desire to bargain a change in the Plan was unclear and that Schlitz refused to attend the meeting of May 22, 1981 because it desired to follow a consistent line on separate bargaining, the Arbitrator concludes that Clayton's testimony is not persuasive of his opinions.

As to Clayton's reference to ERISA being like a template laid down over collective bargaining about pensions, giving the bargainers no freedom to ignore the requirements of ERISA, the Arbitrator agrees that on many matters the analogy of a template is appropriate. *However, there is a clear distinction between those provisions of*

ERISA which require certain pension plan decisions or which prohibit certain activities by plans or their fiduciaries and those provisions of ERISA which are permissive. For example, where ERISA requires a minimum vesting schedule, a pension plan subject to ERISA cannot adopt or maintain a vesting schedule which violates the minimum schedule established by ERISA. On the other hand, ERISA (MPPAA) does not mandate the adoption of a direct attribution method of calculating withdrawal liability. If the parties who have the power to amend a plan desire to adopt the direct attribution method, they may do so. If they do not, then the statutorily prescribed presumptive method applies.

It can be argued that, in the case of the Milwaukee Brewery Workers' Pension Plan, the direct attribution method of calculating withdrawal liability is a better method than the presumptive method. However, the decision to adopt a method is a decision to be made by those parties to a multiemployer pension plan who have the authority and power to amend the plan. In this case, the power and authority to amend the Plan resided in the hands of the three Employers and the Union. Schlitz never concurred in the amendment which was adopted on May 22, 1981 and readopted in a refined form on May 29, 1981. Therefore, as to Schlitz, the only method under MPPAA which can be used to calculate the withdrawal liability is the presumptive method.

Clayton made much of the fact that by not attending the meeting of May 22, 1981, and by not agreeing to the amendment changing the method of calculating withdrawal liability, Schlitz was defying the wishes of the other three parties to the Plan. That seems to be the fact. However, the Union and Pabst and Miller cannot overcome the refusal of Schlitz to agree to an amendment to the Plan by simply adopting the amendment themselves.

The Plan cited the case of *Burud v Acme Electric Co, Inc,* 5 EBC 1793 (DC Alaska 1984) as authority for the proposition that a majority of the trustees may act to bind a trust. This case, it is argued by the Plan, supports the action of the Union, Miller and Pabst in amending the Plan. In the Arbitrator's opinion, the facts of the *Burud* case are so clearly different from the facts of the instant Arbitration as to make the case not applicable. In the *Burud* case, the trustees were clearly trustees of a trust. In the instant case the Arbitrator has decided that, with respect to the amending of the Plan, the Union and the Employers were not fiduciaries (trustees) but collective bargaining parties.

Accordingly, the Arbitrator finds that the amendment to the Milwaukee Brewery Workers' Pension Plan adopted by the Memoranda of May 22 and May 29, 1981 is not operative with respect to Schlitz, and that the correct legal and statutory method for calculating Schlitz's withdrawal liability is the presumptive method as set forth at 29 USC 1391(b), and that the decision of the Plan to assess the withdrawal liability of Schlitz on the basis of the direct attribution method is clearly erroneous.

II

WHETHER THE INTEREST ASSUMPTION ADOPTED BY THE PLAN'S ACTUARY AND USED IN THE DETERMINATION OF THE WITHDRAWAL LIABILITY OF SCHLITZ WAS "REASONABLE (TAKING INTO ACCOUNT THE EXPERIENCE OF THE PLAN AND REASONABLE EXPECTATIONS) AND WHICH, IN COMBINATION, OFFER THE ACTUARY'S BEST ESTIMATE OF ANTICIPATED EXPERIENCE UNDER THE PLAN?" 29 USC 1393.

The Plan's Actuary, in calculating the withdrawal liability of Schlitz, adopted an interest assumption of 7%. Schlitz attacked this assumption as not in compliance with 29 USC 1393.

Under 29 USC 1391, the calculation of Schlitz's withdrawal liability was to have been made as of December 31, 1980, which was the last day of the plan year immediately preceding the year of withdrawal. Schlitz withdrew from the Plan in September 1981. The ongoing interest assumption of the Plan in 1980 was 7%

The Plan's Actuary, William Farquhar, testified at length during the Arbitration Hearing. Farquhar is a consulting actuary who was employed by Meidinger Associates, Inc. in Meidinger's Chicago office between 1978 and 1983. Farquhar was the enrolled actuary for the Plan. He supervised and reviewed the preparation of the valuation reports and certified the Schedule B for the Form 5500 filed with the Internal Revenue Service. Farquhar prepared the determination of Schlitz's withdrawal liability.

Farquhar, on leaving Meidinger in August of 1983, took employment with Connecticut General Life Insurance Company (now known as CIGNA). He is currently Assistant Vice President and Consulting Actuary in the group pension division. He serves as consulting actuary and enrolled actuary, servicing 35 to 40 plans.

Farquhar defended the use of the 7% interest assumption in calculating the Schlitz withdrawal liability on several grounds. First, he pointed out that in a revised actuarial report made in December 1980 the ongoing interest assumption was raised from 5% to 7%. This was done to recognize the higher investment return expected. Second, he believed that most actuaries were using the ongoing interest assumption in calculating withdrawal liability in multiemployer plans. Third, the Memorandum of May 29, 1981, which represented the decision of Miller, Pabst and the Union, directed him to use the 7% assumption.

To contest the reasonableness of the 7% interest assumption, Schlitz presented an expert witness, Joseph A. LoCicero. LoCicero is currently employed at Buck Consul-

tants. His position is Benefit consultant and Director of Multiemployer Services. He is a Director of the firm and Secretary of the corporation. LoCicero is an Enrolled Actuary and Attorney. He is Director of Buck's Multiemployer Consulting Unit and provides consulting services to boards of trustees and to employers who participate in multiemployer plans. This includes reviewing withdrawal liability assessments.

In preparation for his testimony in this arbitration, LoCicero reviewed all the documentation relating to the calculation of the withdrawal liability assessed against Schlitz, including the various actuarial exhibits and employee data used by Farquhar to prepare his calculation.

LoCicero's testimony was lengthy and thorough. The initial portion of his testimony was devoted to an explanation of how withdrawal liability is calculated and the factors which an actuary must take into account in making the calculations. Specifically, on the subject of the interest rate assumption, LoCicero took exception to the use of the identical interest rate for the calculation of the withdrawal liability as the actuary used for the ongoing Plan.

LoCicero brought out the different elements and factors which must be considered in calculating withdrawal liability as against those which must be considered in calculating ongoing benefits for all participants in the future. He adverted to the shorter payout period which is involved in withdrawal cases and the fact that rates of return on the assets on hand can be more confidently anticipated than the long term rates of return which must be estimated for ongoing plan calculations.

In substance, LoCicero testified that he believes that the use of the ongoing Plan interest assumption is improper and unreasonable when applied to the calculation of withdrawal liability.

LoCicero testified from exhibits showing that actuaries,

when calculating withdrawal liability, have used rates of interest which are higher than the ongoing plan rate. In particular, LoCicero advocated the use of interest rates as set and published by the PBGC on December 31, 1980 or January 1, 1981 which exceeded the 7%, used by Farquhar. Or, in the alternative, he advocated the use of a "blended" rate, as devised by the Martin E. Segal Company (Segal Co.).

The Plan also presented an expert witness on the subject of the interest rate assumption. He was Thomas D. Levy. Levy is a Consulting Actuary. He has been employed by the Martin E. Segal Company since 1968. After several management and actuarial positions with Segal Co., Levy was placed in charge of the actuarial operations of the company in Washington, D.C. and Atlanta. In February of 1988 he was named Chief Actuary of the company. He is also a Senior Vice President and a member of the Management Committee.

Segal Co. has as its clients probably the largest number of multiemployer pension plans that any actuarial firm has in the United States. Segal Co. has developed a "blended" rate which it uses in calculating withdrawal liability. The blended rate is, in substance, a combination of the ongoing interest rate and PBGC rates. The blending, as performed by Segal Co., reflects the relationship between the unfunded vested benefits and the assets which a plan has on hand at the time that an employer withdraws.

Testimony and exhibits were introduced which showed that the Segal Co. blended rate in December 1980 was 7.5%. Levy explained, however, that this blended rate was arrived at by using an ongoing plan rate of 6%, combined with PBGC rates. Therefore, according to Levy, it was not applicable to this case because the ongoing interest assumption used by Farquhar was 7%. Levy testified that in his opinion the use of a 7% interest rate in the calculating of the Schlitz withdrawal liability was a reasonable judgment.

DISCUSSION

The matter of the appropriate interest rate to be used has been an issue in almost every withdrawal case of which there is a record. Numerous actuaries have given their varying opinions in both court cases and arbitrations. The subject has been discussed in many publications. There is no uniformity of opinion. Apparently, the decision on what rate is to be used is a discrete judgment based on a variety of factors which each actuary values in his own way. Accordingly, it is perhaps less difficult for an arbitrator or a judge to discern when an unreasonable rate has been used than to determine a reasonable rate.

The ongoing funding rate is commonly used in calculating withdrawal liability. At least two reasons are frequently given for this fact.

1. It is in the best interest of the plan to use a consistent interest rate to preclude controversy and to assess withdrawal liability in concert with historic plan funding policy;

2. The ongoing interest rate assumption is in keeping with what the fund has been earning and can be defended. It is simple, consistent and has been upheld in court cases.

(See Feuer, "The Selection and Arbitration of Withdrawal Liability Interest Rates", *Employee Benefits Journal,* Volume 10, Number 1, March 1985, p 23.)

The Arbitrator has carefully weighed the testimony of Farquhar, LoCicero and Levy and believes that, on the basis of the evidence presented, as of December 31, 1980, a 7% interest rate assumption for the purpose of calculating withdrawal liability was reasonable within the meaning of 29 USC 1393. That is not to say that an interest rate assumption of 7.5% would have been unreasonable. Unfortunately, there is no way of determining exactly what a reasonable rate is. And, more to the point, MPPAA re-

quires that the Arbitrator set aside the plan's interest rate assumption only if he finds it to be unreasonable. That this Arbitrator cannot conclude in this case. Therefore, the Arbitrator finds that the 7% interest rate assumption used by the Plan in calculating the Schlitz withdrawal liability was reasonable and, accordingly, the Arbitrator sustains the use of this interest rate.

ISSUE III

WAS THE RETIREMENT AGE ASSUMPTION (PENSION COMMENCEMENT DATE) WHICH WAS USED BY FARQUHAR "REASONABLE (TAKING INTO ACCOUNT THE EXPERIENCES OF THE PLAN AND REASONABLE EXPECTATIONS) AND WHICH, IN COMBINATION, OFFER THE ACTUARY'S BEST ESTIMATE OF ANTICIPATED EXPERIENCE UNDER THE PLAN"? 29 USC 1393.

The Plan and Schlitz agree that the calculation of Schlitz's withdrawal liability in this case must be made as of December 31, 1980. For the purpose of the retirement age assumption, Farquhar, the Plan actuary, assumed that all Plan participants who were eligible for early retirement (age 55 plus 10 years of service) would take their retirement on January 1, 1981 or as soon thereafter as they became eligible. Schlitz challenged this assumption as unreasonable.

Farquhar testified that he adopted the retirement age assumption which he used because he was of the opinion that all Schlitz employees who were eligible for early retirement or normal retirement would immediately retire on the closing of the Schlitz Brewery. Farquhar said he believed that the Union brewery workers employed by Schlitz would not be able to readily find employment in the brewing industry in Milwaukee upon the closing of the Schlitz plant. Having been informed that the brewing industry was in a declining state in Milwaukee in 1980 and 1981, Farquhar stated that he did not believe that the

remaining two breweries could absorb the terminated Schlitz employees.

Farquhar testified further that the Plan provides excellent monetary inducements and benefits for early retirement. Thus, those participants who are 55 years of age or older can retire with enhanced benefits from the Plan and look for other employment outside the brewing industry and still draw their pensions.

However, it is to be noted that this same assumption was adopted by Farquhar for the employees of Miller and Pabst. When Farquhar was questioned as to why he had made the same retirement assumption for the Miller and Pabst employees when he had no reason to believe that the Miller or Pabst Breweries were about to terminate operations, Farquhar's answer was that actuarial principles related to the direct attribution method required him to use the same assumption for all participants. Farquhar acknowledged that he had no reason to assume that the Miller or Pabst breweries would close down. However, he stated that in view of the fact that, as of December 31, 1980, he could not know what events or terminations would take place in 1981, he was obliged to make one assumption for all participants which would operate correctly, under actuarial principles, whether one or more breweries shut down in 1981. Farquhar acknowledged that his retirement assumption was "case specific". This acknowledgment was confirmed by a Plan Exhibit (157) which showed that almost all eligible Schlitz employees took retirement promptly after the Schlitz Brewery was closed.

The Arbitrator questioned the two expert actuarial witnesses, Levy and LoCicero, about Farquhar's retirement assumption. Levy stated that the only appropriate retirement age assumption which Farquhar could make, as of December 31, 1980, was the assumption Farquhar used. Levy testified that this was the only assumption which could be contemplated by Farquhar, even though at the

time the withdrawal calculations were made, in September 1981, Farquhar knew that, in fact, only Schlitz, of the three breweries, had closed its plant, and the other two breweries were continuing to produce beer and employ Plan participants. Levy said that this was the classically correct actuarial retirement age assumption to be made, based upon the use of the direct attribution method.

When the Arbitrator questioned Levy further, Levy indicated that he was not sure whether the retirement assumption used by Farquhar would be a reasonable and actuarially correct assumption if the presumptive method of calculating withdrawal liability was used instead of the direct attribution method. He said, "I'm not sure whether I come to the same conclusion under the presumptive method." (Tr. p 821)

The Arbitrator then asked Levy: "Are you saying that under the presumptive method you'd have to use the same retirement assumptions as were used here for the direct attribution?" Levy answered: "No, I'm not saying that. I'm saying they would have to be the same with respect to all employers, and I'm saying I am not as comfortable with the one that was used here in the situation of a presumptive method calculation as I am in the direct attribution." The Arbitrator then asked Levy, "How would you do it if it were the presumptive method?" Levy answered, "I'd have to do a lot of hard thinking about the retirement age assumption in that set of circumstances . . ." (Tr. pp 823, 824)

LoCicero also agreed that the retirement age assumption was required to be made as of December 31, 1980, but LoCicero stated that it was incorrect to assume, as Farquhar did, that all participants 55 years of age or older, with 10 years of service or more, would retire in 1981. LoCicero said that Farquhar had used an assumption which was "case specific", because it really rested on Farquhar's belief that all eligible Schlitz employees would take retirement as soon as possible after the Schlitz Brewery closed.

LoCicero asserted that in making the retirement age assumption, the actuary should avoid being case specific.

In his testimony, LoCicero proposed another retirement age assumption, which he called "select and ultimate". Under this assumption, the actuary would assume that, for 1981, all participants eligible for early retirement or normal retirement would take their retirement, but beginning in 1982 the Plan's ongoing retirement age assumption would be used. The result of this assumption was that 35% of the participants were treated as taking retirement in 1981. The balance were assumed to take their retirement according to the schedule in the Revised Actuarial Report of December 1980. The difficulty with this testimony, however, was that LoCicero acknowledged that he knew of no plan which had adopted a select and ultimate assumption in a withdrawal liability case. LoCicero stated that a select and ultimate assumption has been used with respect to turnover projections and has been used with respect to interest rates, and that it may be a unique approach for this special case with respect to retirement assumptions. But he also stated that he did not recall ever seeing it used in a case involving withdrawal liability, and he stated that he does not believe in this method because it is a case specific method.

DISCUSSION

To the Arbitrator, the testimony of the actuaries on the issue of retirement age assumption was incomplete and selfcontradictory. The three actuaries agreed that the retirement age assumption was to have been made as of December 31, 1980. However, it seems clear that Farquhar could not have known on December 31, 1980 of the Schlitz withdrawal. It seems equally clear that when Farquhar made his withdrawal calculations in September of 1981, he was aware of the Schlitz withdrawal and based his assumption on retirements which he expected would flow from the

closing of the Schlitz Brewery on July 31, 1981. But he used a single assumption for all participants without any reason to believe that the pension commencement dates for Miller and Pabst employees would be the same as for Schlitz employees. Farquhar defended his assumption by the assertion that he is required to use a single assumption for all participants and Employers, and that the assumption he used was reasonable under the direct attribution method, which he was directed to use.

Levy agreed with Farquhar's retirement age assumption. LoCicero criticized Farquhar's assumption as being case specific. But LoCicero's proposed assumption is also case specific. It reaches substantially the same result as Farquhar's assumption with respect to the Schlitz employees, but shifts back to the retirement assumptions in the Revised Actuarial Report of December 1980 for the Miller and Pabst employees who would not be expected to take retirement in 1981. Is the "select and ultimate" one retirement assumption or two? Is it one assumption for 1981 and a second assumption for 1982 and thereafter? Further, LoCicero did not recommend it because it is case specific and has not been accepted by the actuarial profession for withdrawal liability cases.

The testimony of the actuaries on the subject of retirement age assumption has placed the Arbitrator in the position where he does not have before him a retirement age assumption which he can say should or should not be applied in this case. It is clear from the testimony of Farquhar and Levy that they believe that the retirement age assumption used by Farquhar in calculating the withdrawal liability of Schlitz is reasonable and appropriate, but based upon the use of the direct attribution method. Levy, the Plan's expert, acknowledged that he was not sure about what he thought the correct retirement age assumption should be if the withdrawal liability calculations were based on the presumptive method. Inasmuch as the Arbitrator has decided that the presumptive method is

the statutorily required method to be used in calculating the withdrawal liability of Schlitz, it seems clear that the Arbitrator has not received needed testimony from Levy or Farquhar.

Further, the Arbitrator is not certain what LoCicero's position is with respect to the retirement age assumption if the presumptive method is used. Testifying from Schlitz Exhibit 80, LoCicero did project an amount of withdrawal liability for Schlitz using the interest rate assumption of 7% and the presumptive method and the select and ultimate early retirement age assumption. However, in view of LoCicero's testimony concerning the undetermined status of a select and ultimate retirement age assumption in withdrawal cases, the Arbitrator is not persuaded that the select and ultimate retirement age assumption is a reasonable assumption to be used in this case. Accordingly, the Arbitrator believes he is required to refer this question back to the parties and their actuaries for further consideration and possible agreement.

The Arbitrator is not an actuary. The retirement age assumption is an actuarial decision. Any retirement age assumption to be used in this case must have the support of an actuary or actuaries or the actuarial profession. The Arbitrator defers a decision on this Issue until thirty (30) days after the date of the Award in this case, to allow the Plan and Schlitz and their actuaries to confer for the purpose of reaching an agreement, if possible, on the retirement age assumption to be used in the calculation of the Schlitz withdrawal liability.

ISSUE IV

WAS THE ADDITION OF INTEREST FOR THE YEAR 1981, BY THE PLAN, IN CALCULATING THE PAYMENT SCHEDULE CORRECT UNDER MPPAA?

In calculating the payment schedule of withdrawal liability which was delivered to Schlitz in September of

1981, Farquhar added interest on the unfunded vested benefits which he calculated as owing by Schlitz as of December 31, 1980. Schlitz attacked this addition of interest as being unfounded In MPPAA.

Schlitz withdrew from the Plan in September 1981. Under 29 USC 1391, the withdrawal liability of Schlitz was calculated as of December 31, 1980. 29 USC 1399(c) sets forth the payment requirements for withdrawal liability:

> [A]n employer shall pay the amount determined under §1391 . . . over the period of years necessary to amortize the amount in level payments determined under sub paragraph (C), calculated as if the first payment were made on the first day of the plan year following the plan year in which the withdrawal occurs and as if each subsequent payment were made on the first day of each subsequent plan year.

The Plan argued that the use of the word "amortize" in the statute means that interest is to be added from December 31, 1980, the date as of which the withdrawal liability has been calculated. Schlitz argued that, since payments were to be calculated as if the first payment were made on the first day of the plan year following the plan year in which the withdrawal occurs, the interest addition should not be made until the first annual payment as prescribed in the statute was due, namely, January 1, 1982.

This subject has been discussed at length in three (3) recent arbitrations. These are:

1. *Casablanca Industries, Inc and UFCW Local 23 GiantEagle Pension Fund* (Jaffe, Arbitrator), 7 EBC 2705, 2726
2. *Loomis Armored, Inc and Central States Pension Fund* (Tilove, Arbitrator), 8 EBC, 1899, 1918
3. *Carnation Co, Inc and Central States Pension Fund* (Nagle, Arbitrator), 9 EBC, 1409, 1448

In view of the extensive discussion of the issue of so-called "pre-demand interest" in these three cited cases, the Arbitrator believes it would be redundant to repeat what the three (3) Arbitrators have said in their Opinions. The three opinions thoroughly review all the arguments and documentation which are relevant and applicable to this issue. This Arbitrator is convinced that the Opinions expressed by Arbitrators Jaffe in *Casablanca* and Nagle in *Carnation* correctly set forth the application of MPPAA to the subject of pre-demand interest. In substance, it appears to this Arbitrator that in view of the clear statutory declaration that the payment schedule shall be determined as if the first payment is to be made on the first day of the plan year following withdrawal, which, in this case, would be January 1, 1982, and in view of the fact that the statute makes no provision for the payment of interest except on overdue payments, it is not correct to assess pre-demand interest on a withdrawing employer by interpretation of the word "amortize".

The critical point in the mind of this Arbitrator is that, although the statute requires the withdrawal liability to be calculated as of the end of the plan year immediately preceding the year of withdrawal, the statute does not say that the money is due at that time. Congress selected a logical date to be used for the calculation of withdrawal liability. However, Congress also provided a commencement date for the payment which is as if the first payment were made on the first day of the plan year following the plan year in which the withdrawal occurs. Accordingly, the Arbitrator decides that the inclusion of the pre-demand interest by the Plan, in this case, was improper and not in accordance with MPPAA, and, therefore, is clearly erroneous.

CALCULATION

During the course of the Arbitration, the Arbitrator requested the Attorneys and Actuaries for the Plan and

Schlitz to jointly attempt to produce calculations of withdrawal liability based upon sixteen (16) different scenarios. The parties responded cooperatively and furnished the Arbitrator a "Joint Submission Regarding Schlitz Withdrawal Liability Amount". The Joint Submission showed agreement in eight (8) of the scenarios. In the remaining eight scenarios, agreement on amounts was reached, depending upon certain decisions to be made by the Arbitrator. Further, depending upon the decision of the Arbitrator on the assessment of interest for the period January 1, 1981 through December 31, 1981 (the "pre-demand interest" issue), the Joint Submission stated that "it is not anticipated that there will be any material disagreements in the payment schedule once that issue is resolved". However, in view of the fact that the Arbitrator, on the basis of the evidence presented, is unable to decide the issue of the correct retirement age assumption to be used, it is not possible to arrive at the final calculation of the Schlitz withdrawal liability until the Plan and Schlitz respond to the Arbitrator as is required under Item 5 of the Award.

RELATED MATTER ON INTEREST

During the course of the Arbitration, reference was made to the fact that, when originally computing the payments of Schlitz, the Plan demanded quarterly payments, as is permitted by MPPAA, but the Plan added interest to the quarterly payments. As the arbitration progressed it appeared to the Arbitrator from remarks which were made by Plan counsel that the Plan had recognized Farquhar's error in adding interest to the quarterly payments and that the payment schedule was adjusted to reflect the deletion of this interest. If that has not been done, the Arbitrator directs that the interest payments shall be recalculated on an annual basis only.

REQUEST FOR ATTORNEYS' FEES AND COSTS BY THE JOS. SCHLITZ BREWING COMPANY

Under date of February 3, 1988, James W. Greer, one of the attorneys for Schlitz, filed with the Arbitrator a Request for Attorneys' Fees and Costs. The Request, supported by the Affidavit of Greer, requested fees and costs totalling $2,112.05. The Request was based upon the assertion that these costs were incurred by a delay on the part of the Plan in presenting its witness, Jeffrey Clayton, at the second set of arbitration hearings in Romulus, Michigan.

When the first scheduled Hearings were adjourned in Milwaukee, Wisconsin on August 14, 1987, Greer and Counsel for the Plan discussed the scheduling of witnesses to be heard on September 29, 1987 and September 30, 1987 and October 1, 1987, if needed. Greer requested that Jeffrey Clayton be available for his testimony on September 30, 1987 if time permitted taking his testimony that day.

Before the hearing resumed on September 29, 1987, Counsel for the Plan notified Greer that Jeffrey Clayton's testimony would have to be taken on October 1, 1987 because Plan Counsel wanted an opportunity to meet with Jeffrey Clayton prior to his taking the witness stand.

The Plan filed a written response and objection to the granting of the Request for attorneys' Fees and Costs by the Jos. Schlitz Brewing Company.

The Arbitrator can understand Greer's unhappiness about being required to stay over in Romulus, Michigan another day and using up additional time on this matter. However, in view of the obviously large expenditure of money by both the Plan and Schlitz in the preparation for and presentation of this case, the Arbitrator is of the opinion that the sum of $2,112.05 is a small cost.

The Arbitrator is not insensitive to costs and to delays which cause costs to be incurred, but the Arbitrator has also tried to accommodate the parties in this case to enable them to present their cases fully and fairly. Accordingly, the Arbitrator believes that the Plan must be allowed the latitude which it insisted upon in the handling of its witness, Jeffrey Clayton and, therefore, the Arbitrator denies the Request for Attorneys' Fees and Costs by the Jos. Schlitz Brewing Company.

ISSUES

The Plan and Schlitz had stipulated the following AGREED STATEMENT OF ISSUES at the outset of the Arbitration:

1. Whether the presumption of correctness in 29 USC 4221(a)(3) should be applied to any determination of the Plan?

2. Whether the presumption of correctness in 29 USC 4221(a)(3) is applicable to the resolution of Issues 3 and 4 below?

3. Whether the Plan was amended as a result of the May 22, 1981 and May 29, 1981 Memoranda of Understanding between Miller, Pabst and the Union?

4. If so, were these amendments applicable to the withdrawal of Schlitz from the Plan?

[Quite obviously, the statutory references in Issues 1 and 2 above are intended to be 29 USC 1401(a)(3).]

In addition, the Plan and Schlitz each submitted separate STATEMENTS OF ISSUES.

The Arbitrator believes that, in the foregoing Opinion and the following Award, he has responded to the AGREED STATEMENT OF ISSUES and to the separate STATEMENTS OF ISSUES, as well.

AWARD

The Arbitrator awards that:

1. To calculate the withdrawal liability of the Jos. Schlitz Brewing Company, the Milwaukee Brewery Workers' Pension Plan shall use the presumptive method of calculating withdrawal liability as provided in 29 USC 1391(b).

2. The interest assumption of seven (7%) percent adopted by the Plan's actuary is a reasonable interest assumption and shall be used in the calculating of the withdrawal liability of Schlitz.

3. Interest on the Schlitz withdrawal liability for the period January 1, 1981 through December 31, 1981 was improperly added to the liability, and the interest on the liability of Schlitz shall commence with January 1, 1982.

4. The request of Schlitz for an award of costs in the amount of $2,112.05 is denied.

5. A decision on the issue of the retirement age assumption is deferred for a period of thirty (30) days from the date of this Award to permit the Plan and Schlitz and their actuaries to confer to reach agreement, if possible, on the retirement age assumption to be used in calculating the Schlitz withdrawal liability. The Arbitrator shall be advised in writing by the Plan and Schlitz concerning the outcome of their conferences. If no agreement is reached between the Plan and Schlitz on this issue, the Arbitrator will take additional testimony or consider written submissions and will decide the issue, after which the withdrawal liability of Schlitz can be calculated.

In the event of judicial review of this Arbitration, the entire transcript, the exhibits, the briefs and the appendices presented in this case are incorporated into and made a part of this Award.

The Arbitrator retains jurisdiction of the case for a period of sixty (60) days, which may be extended if necessary, to permit the Plan and Schlitz to produce a response to Award Item 5 and to submit to the Arbitrator, in writing, any agreement reached in the calculation of withdrawal liability based upon the Joint Submission Regarding Schlitz Withdrawal Liability Amount, or based upon any other agreements, and based on the Award set forth hereinabove.

_____

BOAZ SIEGEL

Dated: July 7, 1988

EXHIBIT F

EXHIBIT B

BEFORE
BOAZ SIEGEL, ARBITRATOR

In the Matter of the
Arbitration Between

MILWAUKEE BREWERY WORKERS'
PENSION PLAN

and

JOS. SCHLITZ BREWING COMPANY

FINAL AWARD

Pursuant to the Opinion and Award issued by the undersigned Arbitrator under date of July 7, 1988 in this matter, Milwaukee Brewery Workers' Pension Plan (Plan) and the Jos. Schlitz Brewing Company (Schlitz), as directed by Item 5 of the Award, have met and agreed upon the retirement age assumption to be used in calculating the withdrawal liability of Schlitz.

In evidence of their agreement, the Plan and Schlitz have submitted to the Arbitrator, a document entitled "JOINT SUBMISSION REGARDING RETIREMENT AGE ASSUMPTION AND WITHDRAWAL LIABILITY CALCULATION", which is attached hereto and made a part of this Final Award.

This Joint Submission, in addition to resolving the issue of the retirement age assumption to be used, also sets forth a calculation of the withdrawal liability of Schlitz, based upon the Award of July 7, 1988 as well as the agreed upon retirement age assumption.

The agreements between the Plan and Schlitz, as set forth in the Joint Submission, resolves the remaining open Issue before the Arbitrator and also sets forth the agreed upon withdrawal liability of Schlitz.

Accordingly, the Arbitrator hereby readopts his Opinion and Award of July 7, 1988 and adds to it, the Joint Submission attached hereto, dated August 24, 1988 and hereby awards that the withdrawal liability of Schlitz, payable to the Plan, is in the amount of $23,300,000.00, to be paid according to the schedule set forth in Exhibit A of the Joint Submission.

This Arbitration matter is hereby closed.

BOAZ SIEGEL

Dated: August 24, 1988

BEFORE
BOAZ SIEGEL, ARBITRATOR

In the Matter of the
Arbitration Between
MILWAUKEE BREWERY WORKERS'
PENSION PLAN

and

J0S. SCHLITZ BREWING COMPANY

JOINT SUBMISSION REGARDING RETIREMENT AGE ASSUMPTION AND WITHDRAWAL LIABILITY CALCULATION

The actuaries for the Plan and Schlitz have reached agreement with respect to the retirement age assumption to be used in calculating the withdrawal liability of Schlitz. That assumption calls for the use of on-going retirement assumptions for all employees as of 12/31/79, termination assumptions for the withdrawing employer's employees (in this case Schlitz) as of 12/31/80 and on-going assumptions for all other plan participants.

The actuaries have also calculated the withdrawal liability of Schlitz on the basis of the above described retirement age assumption and the following assumptions and methods as found by the Arbitrator in his Opinion and Award dated July 7, 1988:

(1) Presumptive allocation method;

(2) 7% interest rate;

(3) Payment schedule with interest charged annually and excluding any interest charge for the year of withdrawal.

The withdrawal liability of Schlitz as of 12/31/80 is $23,300,000. The payment schedule which reflects the adjusted withdrawal liability of Schlitz is attached hereto as Exhibit A and incorporated herein by reference.

Dated: August 24, 1988

Harvey A. Kurtz
David C. Hertel
James W. Greer
Attorneys for Schlitz

The Milwaukee Brewery Workers' Pension Plan specifically reserves its right to appeal any and all appealable Issues from the Arbitrator's final order.

Marc Gertner
Robert G. Clayton
Attorneys for the Plan

SCHLITZ - J-PRIME PAYMENT SCHEDULE

WITHDRAWAL LIABILITY $23,300,000
PRESUMPTIVE
I = 7%
ONGOING ASSUMPTIONS WITH TERMINATION ASSUMPTION FOR SCHLITZ EMPLOYEES ONLY AT 12/31/80

PAYMENT NUMBER	QUARTERLY PAYMENT
1	986,370
2	986,370
3	986,370
4	986,370
5	986,370
6	986,370
7	986,370
8	986,370
9	986,370
10	986,370
11	986,370
12	986,370
13	986,370
14	986,370
15	986,370
16	986,370
17	986,370
18	986,370
19	986,370
20	986,370
21	986,370
22	986,370
23	986,370
24	986,370
25	986,370
26	986,370
27	986,370
28	986,370
29	880,331

Exhibit A

EXHIBIT G

Applicable Statutes

29 § 1002

(21)(A) Except as otherwise provided in subparagraph (B), a person is a fiduciary with respect to a plan to the extent (i) he exercises any discretionary authority or discretionary control respecting management of such plan or exercises any authority or control respecting management or disposition of its assets, (ii) he renders investment advice for a fee or other compensation, direct or indirect, with respect to any moneys or other property of such plan, or has any authority or responsibility to do so, or (iii) he has any discretionary authority or discretionary responsibility in the administration of such plan. Such term includes any person designated under section 1105(c)(1)(B) of this title.

29 § 1391

§ 1391. Methods for computing withdrawal liability

(a) Determination of amount of unfunded vested benefits allocable to employer withdrawn from plan

The amount of the unfunded vested benefits allocable to an employer that withdraws from a plan shall be determined in accordance with subsection (b), (c), or (d) of this section.

(b) Factors determining computation of amount of unfunded vested benefits allocable to employer withdrawn from plan

(1) Except as provided in subsections (c) and (d) of this section, the amount of unfunded vested benefits allocable to an employer that withdraws is the sum of—

(A) the employer's proportional share of the unamortized amount of the change in the plan's unfunded vested benefits for plan years ending after September 25, 1980, as determined under paragraph (2),

(B) the employer's proportional share, if any, of the unamortized amount of the plan's unfunded vested benefits at the end of the plan year ending before September 26, 1980, as determined under paragraph (3); and

(C) the employer's proportional share of the unamortized amounts of the reallocated unfunded vested benefits (if any) as determined under paragraph (4).

If the sum of the amounts determined with respect to an employer under paragraphs (2), (3), and (4) is negative, the unfunded vested benefits allocable to the employer shall be zero.

(2)(A) An employer's proportional share of the unamortized amount of the change in the plan's unfunded vested benefits for plan years ending after September 25, 1980, is the sum of the employer's proportional shares of the unamortized amount of the change in unfunded vested benefits for each plan year in which the employer has an obligation to contribute under the plan ending—

(i) after such date, and

(ii) before the plan year in which the withdrawal of the employer occurs.

(B) The change in a plan's unfunded vested benefits for a plan year is the amount by which—

(i) the unfunded vested benefits at the end of the plan year, exceeds

(ii) the sum of—

(I) the unamortized amount of the unfunded vested benefits for the last plan year ending before September 26, 1980, and

(II) the sum of the unamortized amounts of the change in unfunded vested benefits for each plan year ending after September 25, 1980, and preceding the plan year for which the change is determined.

(C) The unamortized amount of the change in a plan's unfunded vested benefits with respect to a plan year is the change in unfunded vested benefits for the plan year, reduced by 5 percent of such change for each succeeding plan year.

(D) The unamortized amount of the unfunded vested benefits for the last plan year ending before September 26, 1980, is the amount of the unfunded vested benefits as of the end of that plan year reduced by 5 percent of such amount for each succeeding plan year.

(E) An employer's proportional share of the unamortized amount of a change in unfunded vested benefits is the product of—

(i) the unamortized amount of such change (as of the end of the plan year preceding the plan year in which the employer withdraws); multiplied by

(ii) a fraction—

(I) the numerator of which is the sum of the contributions required to be made under the plan by the employer for the year in which such change arose and for the 4 preceding plan years, and

(II) the denominator of which is the sum for the plan year in which such change

arose and the 4 preceding plan years of all contributions made by employers who had an obligation to contribute under the plan for the plan year in which such change arose reduced by the contributions made in such years by employers who had withdrawn from the plan in the year in which the change arose.

(3) An employer's proportional share of the unamortized amount of the plan's unfunded vested benefits for the last plan year ending before September 26, 1980, is the product of—

(A) such unamortized amount; multiplied by—

(B) a fraction—

(i) the numerator of which is the sum of all contributions required to be made by the employer under the plan for the most recent 5 plan years ending before September 26, 1980, and

(ii) the denominator of which is the sum of all contributions made for the most recent 5 plan years ending before September 26, 1980, by all employers—

(I) who had an obligation to contribute under the plan for the first plan year ending on or after such date, and

(II) who had not withdrawn from the plan before such date.

4(A) An employer's proportional share of the unamortized amount of the reallocated unfunded vested benefits is the sum of the employer's proportional shares of the unamortized amount of the reallocated unfunded vested benefits for each plan year ending before the plan year in which the employer withdrew from the plan.

(B) Except as otherwise provided in regulations prescribed by the corporation, the reallocated unfunded vested benefits for a plan year is the sum of—

(i) any amount which the plan sponsor determines in that plan year to be uncollectible for reasons arising out of cases or proceedings under Title 11, or similar proceedings.

(ii) any amount which the plan sponsor determines in that plan year will not be assessed as a result of the operation of section 1389, 1399(c)(1)(B), or section 1405 of this title against an employer to whom a notice described in section 1399 of this title has been sent, and

(iii) any amount which the plan sponsor determines to be uncollectible or unassessable in that plan year for other reasons under standards not inconsistent with regulations prescribed by the corporation.

(C) The unamortized amount of the reallocated unfunded vested benefits with respect to a plan year is the reallocated unfunded vested benefits for the plan year, reduced by 5 percent of such reallocated unfunded vested benefits for each succeeding plan year.

(D) An employer's proportional share of the unamortized amount of the reallocated unfunded vested benefits with respect to a plan year is the product of—

(i) the unamortized amount of the reallocated unfunded vested benefits (as of the end of the plan year preceding the plan year in which the employer withdraws); multiplied by

(ii) the fraction defined in paragraph (2)(E)(ii).

(c) Amendment of multiemployer plan for determination respecting amount of unfunded vested benefits allocable to employer withdrawn from plan; factors determining computation of amount

(1) A multiemployer plan, other than a plan which primarily covers employees in the building and construction industry, may be amended to provide that the amount of unfunded vested benefits allocable to an employer that withdraws from the plan is an amount determined under paragraph (2), (3), (4), or (5) of this subsection, rather than under subsection (b) or (d) of this section. A plan described in section 1383(b)(1)(B)(i) of this title (relating to the building and construction industry) may be amended, to the extent provided in regulations prescribed by the corporation, to provide that the amount of the unfunded vested benefits allocable to an employer not described in section 1383(b)(1)(A) of this title shall be determined in a manner different from that provided in subsection (b) of this section.

(2)(A) The amount of the unfunded vested benefits allocable to any employer under this paragraph is the sum of the amounts determined under subparagraphs (B) and (C).

(B) The amount determined under this subparagraph is the product of—

(i) the plan's unfunded vested benefits as of the end of the last plan year ending before September 26, 1980, reduced as if those obligations were being fully amortized in level annual installments over 15 years beginning with the first plan year ending on or after such date; multiplied by

(ii) a fraction—

(I) the numerator of which is the sum of all contributions required to be made by

the employer under the plan for the last 5 plan years ending before September 26, 1980, and

(II) the denominator of which is the sum of all contributions made for the last 5 plan years ending before September 26, 1980, by all employers who had an obligation to contribute under the plan for the first plan year ending after September 25, 1980, and who had not withdrawn from the plan before such date.

(C) The amount determined under this subparagraph is the product of—

(i) an amount equal to—

(I) the plan's unfunded vested benefits as of the end of the plan year preceding the plan year in which the employer withdraws, less

(II) the sum of the value as of such date of all outstanding claims for withdrawal liability which can reasonably be expected to be collected, with respect to employers withdrawing before such plan year, and that portion of the amount determined under subparagraph (B)(i) which is allocable to employers who have an obligation to contribute under the plan in the plan year preceding the plan year in which the employer withdraws and who also had an obligation to contribute under the plan for the first plan year ending after September 25, 1980; multiplied by

(ii) a fraction—

(I) the numerator of which is the total amount required to be contributed under the plan by the employer for the last 5 plan years ending before the date on which the employer withdraws and

(II) the denominator of which is the total amount contributed under the plan by all employers for the last 5 plan years ending before the date on which the employer withdraws, increased by the amount of any employer contributions owed with respect to earlier periods which were collected in those plan years, and decreased by any amounts contributed by an employer who withdrew from the plan under this part during those plan years.

(D) The corporation may be regulation permit adjustments in any denominator under this section, consistent with the purposes of this subchapter, where such adjustment would be appropriate to ease administrative burdens of plan sponsors in calculating such denominators.

(3) The amount of the unfunded vested benefits allocable to an employer under this paragraph is the product of—

(A) the plan's unfunded vested benefits as of the end of the plan year preceding the plan year in which the employer withdraws, less the value as of the end of such year of all outstanding claims for withdrawal liability which can reasonably be expected to be collected from employers withdrawing before such year; multiplied by

(B) a fraction—

(i) the numerator of which is the total amount required to be contributed by the employer under the plan for the last 5 plan years ending before the withdrawal, and

(ii) the denominator of which is the total amount contributed under the plan by all employers for the last 5 plan years ending before the withdrawal, increased by any employer contributions owed with respect to earlier periods which were collected in those plan years, and decreased by any amount contributed to the plan during those plan years by employers who withdrew from the plan under this section during those plan years.

(4)(A) The amount of the unfunded vested benefits allocable to an employer under this paragraph is equal to the sum of—

(i) the plan's unfunded vested benefits which are attributable to participants' service with the employer (determined as of the end of the plan year preceding the plan year in which the employer withdraws), and

(ii) the employer's proportional share of any unfunded vested benefits which are not attributable to service with the employer or other employers who are obligated to contribute under the plan in the plan year preceding the plan year in which the employer withdraws (determined as of the end of the plan year preceding the plan year in which the employer withdraws).

(B) The plan's unfunded vested benefits which are attributable to participants' service with the employer is the amount equal to the value of nonforfeitable benefits under the plan which are attributable to participants' service with such employer (determined under plan rules not inconsistent with regulations of the corporation) decreased by the share of plan assets

determined under subparagraph (C) which is allocated to the employer as provided under subparagraph (D).

(C) The value of plan assets determined under this subparagraph is the value of plan assets allocated to nonforfeitable benefits which are attributable to service with the employers who have an obligation to contribute under the plan in the plan year preceding the plan year in which the employer withdraws, which is determined by multiplying—

(i) the value of the plan assets as of the end of the plan year preceding the plan year in which the employer withdraws, by

(ii) a fraction—

(I) the numerator of which is the value of nonforfeitable benefits which are attributable to service with such employers, and

(II) the denominator of which is the value of all nonforfeitable benefits under the plan

as of the end of the plan year.

(D) The share of plan assets, determined under subparagraph (C), which is allocated to the employer shall be determined in accordance with one of the following methods which shall be adopted by the plan by amendment:

(i) by multiplying the value of plan assets determined under subparagraph (C) by a fraction—

(I) the numerator of which is the value of the nonforfeitable benefits which are attributable to service with the employer, and

(II) the denominator of which is the value of the nonforfeitable benefits which are attributable to service with all employers who have an obligation to contribute under the plan in the plan year preceding the plan year in which the employer withdraws;

(ii) by multiplying the value of plan assets determined under subparagraph (C) by a fraction—

(I) the numerator of which is the sum of all contributions (accumulated with interest) which have been made to the plan by the employer for the plan year preceding the plan year in which the employer withdraws and all preceding plan years; and

(II) the denominator of which is the sum of all contributions (accumulated with interest) which have been made to the plan (for the plan year preceding the plan year in which the employer withdraws and all preceding plan years) by all employers who have an obligation to contribute to the plan for the plan year preceding the plan year in which the employer withdraws; or

(iii) by multiplying the value of plan assets under subparagraph (C) by a fraction—

(I) the numerator of which is the amount determined under clause (ii)(I) of this subparagraph, less the sum of benefit payments (accumulated with interest) made to participants (and their beneficiaries) for the plan years described in such clause (ii)(I) which are attributable to service with the employer; and

(II) the denominator of which is the amount determined under clause (ii)(II) of this subparagraph, reduced by the sum of benefit payments (accumulated with interest) made to participants (and their beneficiaries) for the plan years described in such clause (ii)(II) which are attributable to service with respect to the employers described in such clause (ii)(II).

(E) The amount of the plan's unfunded vested benefits for a plan year preceding the plan year in which an employer withdraws, which is not attributable to service with employers who have an obligation to contribute under the plan in the plan year preceding the plan year in which such employer withdraws, is equal to—

(d) Method of calculating allocable share of employer of unfunded vested benefits set forth in subsection (c)(3) of this section; applicability of certain statutory provisions

(1) The method of calculating an employer's allocable share of unfunded vested benefits set forth in subsection (c)(3) of this section shall be the method for calculating an employer's allocable share of unfunded vested benefits under a plan to which section 404(c) of Title 26, or a continuation of such a plan, applies, unless the plan is amended to adopt another method authorized under subsection (b) of this section.

(2) Sections 1384, 1389, 1399(c)(1)(B), and 1405 of this title shall not apply with respect to the withdrawal of an employer from a plan described in paragraph (1) unless the plan is amended to provide that any of such sections apply.

(e) Reduction of liability of withdrawn employer in case of transfer of liabilities to another plan incident to withdrawal or partial withdrawal of employer

In the case of a transfer of liabilities to another plan incident to an employer's withdrawal or partial withdrawal, the withdrawn employer's liability under this part shall be reduced in an amount equal to the value, as of the end of the last plan year ending on or before the date of the withdrawal, of the transferred unfunded vested benefits.

(f) Computations applicable in case of withdrawal following merger of multiemployer plans

In the case of a withdrawal following a merger of multiemployer plans, subsection (b), (c), or (d) of this section shall be applied in accordance with regulations prescribed by the corporation; except that, if a withdrawal occurs in the first plan year beginning after a merger of multiemployer plans, the determination under this section shall be made as if each of the multiemployer plans had remained separate plans.

29 § 1104 Fiduciary duties

(a) Prudent man standard of care

(1) Subject to sections 1103(c) and (d), 1342, and 1344 of this title, a fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and —

(A) for the exclusive purpose of:

(i) providing benefits to participants and their beneficiaries; and

(ii) defraying reasonable expenses of administering the plan;

(B) with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims;

(C) by diversifying the investments of the plan so as to minimize the risk of large losses, unless under the circumstances it is clearly prudent not to do so; and

(D) in accordance with the documents and instruments governing the plan insofar as such documents and instruments are consistent with the provisions of this subchapter or subchapter III of this chapter.

(2) In the case of an eligible individual account plan (as defined in section 1107(d)(3) of this title), the diversification requirement of paragraph (1)(C) and the prudence requirement (only to the extent that it requires diversification) of paragraph (1)(B) is not violated by acquisition or holding of qualifying employer real property or qualifying employer securities (as defined in section 1107(d)(4) and (5) of this title).

(i) an amount equal to —

(I) the value of all nonforfeitable benefits under the plan at the end of such plan year, reduced by

(II) the value of nonforfeitable benefits under the plan at the end of such plan year which are attributable to participants' service with employers who have an obligation to contribute under the plan for such plan year; reduced by

(ii) an amount equal to —

(I) the value of the plan assets as of the end of such plan year, reduced by

(II) the value of plan assets as of the end of such plan year as determined under subparagraph (C); reduced by

(iii) the value of all outstanding claims for withdrawal liability which can reasonably be expected to be collected with respect to employers withdrawing before the year preceding the plan year in which the employer withdraws.

(F) The employer's proportional share described in subparagraph (A)(ii) for a plan year is the amount determined under subparagraph (E) for the employer, but not in excess of an amount which bears the same ratio to the sum of the amounts determined under subparagraph (E) for all employers under the plan as the amount determined under subparagraph (C) for the employer bears to the sum of the amounts determined under subparagraph (C) for all employers under the plan.

(G) The corporation may prescribe by regulation other methods which a plan may adopt for allocating assets to determine the amount of the unfunded vested benefits attributable to service with the employer and to determine the employer's share of unfunded vested benefits not attributable to service with employers who have an obligation to contribute under the plan in the plan year in which the employer withdraws.

(5)(A) The corporation shall prescribe by regulation a procedure by which a plan may, by amendment, adopt any other alternative method for determining an employer's allocable share of unfunded vested benefits under this section, subject to the approval of the corporation based on its determination that adoption of the method by the plan would not significantly increase the risk of loss to plan participants and beneficiaries or to the corporation.

(B) The corporation may prescribe by regulation standard approaches for alternative methods, other than

those set forth in the preceding paragraphs of this subsection, which a plan may adopt under subparagraph (A), for which the corporation may waive or modify the approval requirements of subparagraph (A). Any alternative method shall provide for the allocation of substantially all of a plan's unfunded vested benefits among employers who have an obligation to contribute under the plan.

(C) Unless the corporation by regulation provides otherwise, a plan may be amended to provide that a period of more than 5 but not more than 10 plan years may be used for determining the numerator and denominator of any fraction which is used under any method authorized under this section for determining an employer's allocable share of unfunded vested benefits under this section.

(D) The corporation may by regulation permit adjustments in any denominator under this section, consistent with the purposes of this subchapter, where such adjustment would be appropriate to ease administrative burdens of plan sponsors in calculating such denominators.

29 § 1400

29 § 1400. Approval of amendments

(a) Amendment of covered multiemployer plans; procedures applicable

Except as provided in subsection (b) of this section, if an amendment to a multiemployer plan authorized by any preceding section of this part is adopted more than 36 months after the effective date of this section, the amendment shall be effective only if the corporation approves the amendment, or, within 90 days after the corporation receives notice and a copy of the amendment from the plan sponsor, fails to disapprove the amendment.

(b) Amendment respecting methods for computing withdrawal liability

An amendment permitted by section 1391(c)(5) of this title may be adopted only in accordance with that section.

(c) Criteria for disapproval by corporation

The corporation shall disapprove an amendment referred to in subsection (a) or (b) of this section only if the corporation determines that the amendment creates an unreasonable risk of loss to plan participants and beneficiaries or to the corporation.

(Pub.L. 93—406, Title IV, § 4220, as added Pub.L. 96—364, Title I, § 104(2), Sept. 26, 1980, 94 Stat. 1239.)

29 § 1401

29 § 1401. Resolution of disputes

(a) Arbitration proceedings; matters subject to arbitration, procedures applicable, etc.

(1) Any dispute between an employer and the plan sponsor of a multiemployer plan concerning a determination made under sections 1381 through 1399 of this title shall be resolved through arbitration. Either party may initiate the arbitration proceeding within a 60-day period after the earlier of —

(A) the date of notification to the employer under section 1399(b)(2)(B) of this title, or

(B) 120 days after the date of the employer's request under section 1399(b)(2)(A) of this title.

The parties may jointly initiate arbitration within the 180-day period after the date of the plan sponsor's demand under section 1399(b)(1) of this title.

(2) An arbitration proceeding under this section shall be conducted in accordance with fair and equitable procedures to be promulgated by the corporation. The plan sponsor may purchase insurance to cover potential liability of the arbitrator. If the parties have not provided for the costs of the arbitration, including arbitrator's fees, by agreement, the arbitrator shall assess such fees. The arbitrator may also award reasonable attorney's fees.

(3)(A) For purposes of any proceeding under this section, any determination made by a plan sponsor under sections 1381 through 1399 of this title and section 1405 of this title is presumed correct unless the party contesting the determination shows by a preponderance of the evidence that the determination was unreasonable or clearly erroneous.

(B) In the case of the determination of a plan's unfunded vested benefits for a plan year, the determination is presumed correct unless a party contesting the determination shows by a preponderance of evidence that —

(i) the actuarial assumptions and methods used in the determination were, in the aggregate, unreasonable (taking into account the experience of the plan and reasonable expectations), or

(ii) the plan's actuary made a significant error in applying the actuarial assumptions or methods.

(b) Alternative collection proceedings; civil action subsequent to arbitration award; conduct of arbitration proceedings

(1) If no arbitration proceeding has been initiated pursuant to subsection (a) of this section, the amounts demanded by the plan sponsor under section 1399(b)(1) of this title shall be due and owing on the schedule set forth by the plan sponsor. The plan sponsor may bring an action in a State or Federal court of competent jurisdiction for collection.

(2) Upon completion of the arbitration proceedings in favor of one of the parties, any party thereto may bring an action, no later than 30 days after the issuance of an arbitrator's award, in an appropriate United States district court in accordance with section 1451 of this title to enforce, vacate, or modify the arbitrator's award.

(3) Any arbitration proceedings under this section shall, to the extent consistent with this subchapter, be conducted in the same manner, subject to the same limitations, carried out with the same powers (including subpoena power), and enforced in United States courts as an arbitration proceeding carried out under Title 9.

(c) Presumption respecting finding of fact by arbitrator

In any proceeding under subsection (b) of this section, there shall be a presumption, rebuttable only by a clear preponderance of the evidence, that the findings of fact made by the arbitrator were correct.

(d) Payments by employer prior and subsequent to determination by arbitrator; adjustments; failure of employer to make payments

Payments shall be made by an employer in accordance with the determinations made under this part until the arbitrator issues a final decision with respect to the determination submitted for arbitration, with any necessary adjustments in subsequent payments for overpayments or underpayments arising out of the decision of the arbitrator with respect to the determination. If the employer fails to make timely payment in accordance with such final decision, the employer shall be treated as being delinquent in the making of a contribution required under the plan (within the meaning of section 1145 of this title).

(e) Furnishing of information by plan sponsor to employer respecting computation of withdrawal liability of employer; fees

If any employer requests in writing that the plan sponsor make available to the employer general information necessary for the employer to compute its withdrawal liability with respect to the plan (other than information which is unique to that employer), the plan sponsor shall furnish the information to the employer without charge. If any employer requests in writing that the plan sponsor make an estimate of such employer's potential withdrawal liability with respect to the plan or to provide information unique to that employer, the plan sponsor may require the employer to pay the reasonable cost of making such estimate or providing such information.